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2556
No. 12070

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, et al.,

Appellants.

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD.,

Appellee.


TRANSCRIPT OF RECORD

Appeal From the District Court of the United States
for the Southern District of California,
Central Division

FILED

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PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Los Angeles 13, California [1*]

In the District Court of the United States for the
Southern District of California

Central Division

Civil Action No. 4327 RJ

MYRON E. GLENN, VERNON V. B. WERT, B. E.
MOSES, EUGENE L. ELLINGFORD, HER-
BERT S. KANEEN, HOWARD L. ANDERSEN,
CHARLES STANLEY MYRENIUS, HAROLD
A. BOYNTON, E. N. SWEITZER, JOHN M.
SMITH, W. H. CULBERTSON, F. E. GRIFFES,
CLARENCE ROGERS, M. E. ROACH, E. G.
EGGERS, C. C. BLENIS, J. A. HENLE, VER-
NER NEHER, A. L. HONNELL, PAUL W.
COCKRELL, C. C. PRINSLOW, J. D. BORDEN,
C. R. FRAZIER, LAWRENCE E. JACKSON, C.
E. FOSTER, ANDY G. AUSTIN, W. B. BUR-
TON, E. K. DICKERSON, OATHY G. HORNE,
L. S. MORGAN, MARION S. POSTON, L. A.
PHINNEY, ARCHIE TREGONING, and other
employees similarly situated,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD, a corporation,

Defendant.

SECOND AMENDED COMPLAINT UNDER FAIR
LABOR STANDARDS ACT OF 1938

Plaintiffs, by way of Second Amended Complaint, al-
lege as follows:

I.

Plaintiffs bring this action against defendant under
and by virtue of an Act of Congress of the United States

of America entitled "The Fair Labor Standards Act of 1938" (Act of June 25, 1938, C-678, 58 Stat. 1080; U. S. C., Title 29, Section 201, et seq.), hereinafter called the Act. [2]

II.

Jurisdiction is conferred upon the Court by Section 16(b) of the Act. Plaintiffs allege that, pursuant to Section 16(b) of the Act, they are maintaining this action for and in behalf of themselves and other employees similarly situated.

III.

The defendant, Southern California Edison Company, Ltd., at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City of Los Angeles, County of Los Angeles, State of California, where said corporation is engaged in the generation, distribution and sale of electric power. During all the time and periods mentioned herein, the defendant Southern California Edison Company, Ltd., distributed and sold electric power within the State of California, which it generated at its California plants and at its Boulder Dam, Nevada, plant; said defendant, during the period herein set forth, distributed, sold and delivered electric power in excess of Twenty-five Million Dollars (\$25,000,000.00) annually to shipbuilding companies, aircraft manufacturers, oil producers, steel producers, aluminum producers, railroads, municipalities, the United States Army, the United States

Navy, radio stations, telegraph offices, telephone offices, interstate transportation companies, interstate airline transportation companies, and to hundreds of concerns engaged in the manufacture of goods for interstate commerce, which concerns, at all times herein mentioned, did use the said electric power, sold and distributed and delivered to them by the defendant to carry on their activities in interstate commerce and in the production of goods for interstate commerce. [3]

IV.

That the plaintiffs and all the other employees of said defendant, Southern California Edison Company, Ltd., similarly situated to the plaintiffs during all the times herein mentioned were, and now are, engaged in processes and occupations necessary to the generation, distribution, and sale of the aforesaid electric power by said defendant in interstate commerce, and the plaintiffs and other employees of the defendant, similarly situated to the plaintiffs during the time herein mentioned, were engaged in processes and occupations necessary to the production, distribution and sale of goods in interstate commerce by the customers of said defendant as hereinabove alleged.

V.

That since October 24, 1938, the effective date of the Fair Labor Standards Act, defendant employed the following-named persons, the plaintiffs herein, in the respective capacities and classifications set out herein after their names, to wit:

<u>Name</u>	<u>Classification</u>
Myron E. Glenn	Substation Operator and Attendant
Vernon V. B. Wert	Substation Operator and Attendant
B. E. Moses	Substation Operator and Attendant
Eugene L. Ellingford	Substation Operator and Attendant
Herbert S. Kaneen	Substation Operator and Attendant
Howard L. Anderson	Substation Operator and Attendant
Charles Stanley	
Myrenius	Substation Operator and Attendant
Harold A. Boynton	Substation Operator and Attendant
E. N. Sweitzer	Substation Operator and Attendant
Clarence Rogers	Substation Operator and Attendant
C. C. Blenis	Substation Operator and Attendant
J. A. Henle	Substation Operator and Attendant
Verner Neher	Substation Operator and Attendant
	[4]
C. R. Frazier	Substation Operator and Attendant
Lawrence E. Jackson	Substation Operator and Attendant
C. E. Foster	Substation Operator and Attendant
Andy G. Austin	Substation Operator and Attendant
W. B. Burton	Substation Operator and Attendant
E. K. Dickerson	Substation Operator and Attendant
Oathy G. Horne	Substation Operator and Attendant
L. S. Morgan	Substation Operator and Attendant
Marion S. Poston	Substation Operator and Attendant
Archie Tregoning	Substation Operator and Attendant
John M. Smith	Primary Service Man
W. H. Culbertson	Primary Service Man
A. L. Honnell	Primary Service Man
Paul W. Cockrell	Primary Service Man
C. C. Prinslow	Primary Service Man
J. D. Borden	Primary Service Man
L. A. Phinney	Primary Service Man
F. E. Griffes	Works Tender
M. E. Roach	Electrician
E. G. Eggers	Maintenance Carpenter

VI.

That on frequent occasions since the effective date of the Act, October 24, 1938, plaintiffs and other employees similarly situated to them employed by the defendant, were employed by the defendant for certain hours in excess of the work-weeks established by Section 7 (a), (1), (2), and (3), of said Act; that the defendant failed to pay the compensation for overtime hours in excess of the work-weeks prescribed by the provisions of said Section; that the dates of employment, number of hours and amounts of compensation for such overtime for the plaintiffs and other employees similarly situated, is a matter reported on the books kept by the defendant; plaintiffs have no accurate record of said dates, hours and [5] compensation claimed to be due, owing and unpaid from the defendant to the plaintiffs and other employees similarly situated, and, accordingly, an accounting should be rendered by the defendant to the plaintiffs from the time that plaintiffs and other employees similarly situated were so employed to the date that this action is adjudged, to determine the amount of said claims. That all of the records of said dates, hours and compensation claimed to be due, owing and unpaid from defendant to the plaintiffs and other employees similarly situated, are in the possession of the defendant, Southern California Edison Company, Ltd. That there is due and owing and unpaid from the said defendant to the said plaintiffs and other employees similarly situated, such compensation for the time during which they and each of them were employed in

excess of the work-weeks established by said Act in such amounts as shall be determined by said accounting.

VII.

That the plaintiffs and other employees similarly situated, are entitled to additional sums equal to the amounts claimed by them, as liquidated damages by virtue of the provisions of Section 16(b) of the Act; that plaintiffs have employed David Sokol, attorney, duly authorized to practice in the above-entitled court, and by virtue of said Section 16(b) said attorney is entitled to be awarded a reasonable attorney's fee herein.

Wherefore, plaintiffs pray that the defendant be required to account to plaintiffs and other employees similarly situated to plaintiffs, and each of them, for the total number of hours which each has been employed, up to and including the date that this matter shall be determined, in excess of the minimum work-weeks prescribed by said Act, and the amount of compensation that is required to be paid by said Act, and that upon said sums being computed, a judgment be entered for the plaintiffs and other employees similarly situated to plaintiffs and each of them, and [6] against defendant for such amounts as the accounting will show that they are entitled to receive, together with an additional amount as liquidated damages, and in addition, a reasonable sum for attorney's fees.

DAVID SOKOL

Attorney for Plaintiffs

[Endorsed]: Filed Jun. 23, 1945. Edmund L. Smith,
Clerk. [7]

[Title of District Court and Cause]

NOTICE OF MOTIONS TO DISMISS AND TO
MAKE THE SECOND AMENDED COM-
PLAINT MORE DEFINITE AND CERTAIN
AND TO STRIKE PORTIONS OF THE SEC-
OND AMENDED COMPLAINT

Comes now the defendant Southern California Edison Company, Ltd., a corporation, and moves the Court as follows:

I.

For an order dismissing the said action upon the ground that the said second amended complaint does not state a claim upon which relief can be granted to the plaintiffs or any of them.

II.

For an order dismissing the said action upon the ground that the said second amended complaint does not state a claim upon which relief can be granted to the plaintiffs or any of them in that it does not appear that the plaintiffs or any of them, were engaged in interstate commerce or in the manufacture of goods for interstate commerce. [8]

III.

For an order dismissing the action as to all unnamed parties upon the ground:

1. That the plaintiffs are not authorized to bring a class action or to sue for or on behalf of any other employees.

2. That Section 16(b) of the Act (Section 216 United States Labor Code) does not authorize a representative or class action, but merely joining in the same suit separate actions of individual employees.

3. That the said action has been pending since on or about the 19th day of March, 1945; that the said defendant on or about the 7th day of April, 1945, filed a motion to the original complaint asking for a provisional order that the action be dismissed as to all unnamed persons who did not within thirty (30) days from the date thereof intervene; that thereafter on or about the 1st day of May, 1945, plaintiffs filed an amended complaint and that on or about the 4th day of May, 1945, a similar motion was filed by defendant; that ample time has elapsed for any employee of the defendant believing himself to be similarly situated with the plaintiffs and desiring to bring such action, to join with the said plaintiffs.

4. That it be necessary for the defendant, in order to properly prepare for trial, to know the precise plaintiffs whose claims it is to meet.

IV.

For an order requiring the plaintiffs to make the second amended complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

How or in what manner the plaintiffs or any of them performed work, labor or services for the defendant in interstate commerce, or in the manufacture of goods for interstate commerce. [9]

V.

For an order requiring the plaintiffs to make the second amended complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The character of work and the normal hours of work of those plaintiffs designated as substation operator and attendant.

VI.

For an order requiring the plaintiffs to make the second amended complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The character of work and normal hours of work of those plaintiffs designated as primary servicemen.

VII.

For an order requiring the plaintiffs to make the second amended complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The character of work and normal hours required of the plaintiff F. E. Griffes, designated as works tender.

VIII.

For an order requiring the plaintiffs to make the second amended complaint more definite and certain or to give the defendant a bill of particulars upon the following point:

The character of work and normal hours required of the plaintiff M. E. Roach, designated as electrician.

IX.

For an order requiring the plaintiffs to make the second amended complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The character of work and normal hours required of the plaintiff E. G. Eggers, designated as maintenance carpenter.

X.

For an order requiring the plaintiffs to make the second [10] amended complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The approximate time and the number of excess hours which it is claimed each plaintiff was employed by the said defendant.

XI.

For an order requiring the plaintiffs to make the second amended complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The amount of overtime compensation claimed to be due each plaintiff which it is claimed defendant failed to pay each said plaintiff.

XII.

For an order requiring the plaintiffs to make the second amended complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The amount which it is claimed is due, owing, or unpaid from the defendant to each of said plaintiffs.

XIII.

For an order for a severance of the claims presented by those plaintiffs described in Paragraph V of the said second amended complaint as primary servicemen upon the ground that the questions of law and fact involved as to the plaintiffs described as primary servicemen are not the same as the questions of law and fact involved as to the claims of the other plaintiffs and particularly as to the plaintiffs described as substation operators and attendants, that the plaintiffs described as primary servicemen are not proper or necessary parties to a suit by the other plaintiffs, and that the plaintiffs described as primary servicemen are not similarly situated to the substation operators or to the other plaintiffs.

XIV.

For an order to strike from Paragraph III of said second [11] amended complaint, the words and figures:

“in excess of Twenty-five Million Dollars (\$25,000,000.00).”

Said motion being made upon the ground that said words are incompetent, irrelevant and redundant and allege no fact that it would be competent or relevant for the plaintiffs to prove at the time of the trial and does not afford any guide as to the volume or amount of electrical power distributed, generated or sold to alleged companies, or persons alleged to be engaged in the manufacture of goods for interstate commerce.

XV.

For an order striking from the second amended complaint on page 2, lines 20-21 the words:

“and other employees similarly situated”

where the said words occur at the end of Paragraph II, page 2, line 5, Paragraph IV, page 3, line 8, Paragraph VI, page 4, lines 23-24, 30-31, and page 5, lines 8-9 and 12, Paragraph VII, page 5, line 17.

Said motion is made (1) upon the ground that said words are redundant and irrelevant; that plaintiffs have no right to prosecute this suit for any person or persons other than themselves; and (2) upon all the grounds set out in support of defendant's third motion.

XVI.

For an order striking from Paragraph VI of the second amended complaint, in lines 2 to 6 on page 5, the following words:

“and, accordingly, an accounting should be rendered by the defendant to the plaintiffs from the time that plaintiffs and other employees similarly situated were so employed to the date that this action is adjudged, to determine the amount of said claims.” [12]

Said motion will be made upon the ground that the words moved to be stricken are redundant, irrelevant, and immaterial; that the plaintiff is not entitled to bring an action for an accounting; that the action authorized by the statute is an action at law to recover compensation claimed severally to be due the several plaintiffs for excess hours

which it is alleged and claimed the several plaintiffs were employed and were not paid for, and for liquidated damages resulting from such nonpayment; that the burden is upon each of the plaintiffs to establish the respective claim of each said plaintiff.

XVII.

For an order striking from the prayer of the complaint, page 5, lines 24-31, and page 6, lines 1-3, the following words:

“the defendant be required to account to plaintiffs and other employees similarly situated to plaintiffs, and each of them, for the total number of hours which each has been employed, up to and including the date that this matter shall be determined, in excess of the minimum work-weeks prescribed by said Act, and the amount of compensation that is required to be paid by said Act, and that upon said sums being computed,
* * * for such amounts as the account will show that they are entitled to receive, together with an additional amount as liquidated damages,”.

Said motion will be made upon the ground that the words moved to be stricken are redundant, irrelevant, and immaterial; that the plaintiff is not entitled to bring an action for an accounting; that the action authorized by the statute is an action at law to recover compensation severally claimed to be due the several plaintiffs for excess hours which it is alleged and claimed the several plaintiffs were employed and were not [13] paid for, and for liquidated damages resulting from such nonpayment; that

the burden is and will be upon each of the plaintiffs to establish the respective claim of each said plaintiff.

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd.

1113 Edison Building, Los Angeles,
California

To: David Sokol, Attorney for Plaintiffs Named Herein:

Please Take Notice That the undersigned will bring the above motions on for hearing before this Court in Courtroom No. 3, United States Courts and Post Office Building, the City of Los Angeles, California on the 23rd of July, 1945, at 9:30 A. M., in the forenoon of that day or as soon thereafter as counsel can be heard.

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd.

1113 Edison Building, Los Angeles,
California

[Endorsed]: Filed Jul. 9, 1945. Edmund L. Smith,
Clerk. [14]

[Minutes: Monday, July 23, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for hearing on (1) motion to intervene as plaintiff, Lawrence G. Hagerman, and (2) motions to dismiss and to make the second amended complaint more definite and certain and to strike portions of the second amended complaint; David Sokol, Esq., appearing for the plaintiffs; Norman S. Sterry, Esq., appearing for the defendants.

Attorney Sterry makes a statement that he does not oppose said motion of Lawrence G. Hagerman to intervene. The Court makes a statement. Attorney Sokol makes a statement. The Court orders said motion to intervene granted.

Attorney Sterry makes a statement of said motions to dismiss and to make the second amended complaint more definite and certain, and to strike portions of said second amended complaint, and argues in support thereof.

The Court grants motion of defendants to strike so far as "and other employees similarly situated," however, the Court will consider any other intervening plaintiffs that desire to become parties to this action. The said motions to dismiss, etc., are otherwise denied. [15]

[Title of District Court and Cause]

ANSWER

Comes now the defendant, and for answer to the second amended complaint on file herein:

I.

(a) Specifically answering Paragraph III of said second amended complaint, defendant admits that it is engaged within the State of California as a public utility in the generation, distribution and sale of electric power. Denies that it has, or owns, any plant at Boulder Dam, and alleges in this connection that it is operating a plant at Boulder Dam in Arizona that is owned by the government of the United States, and that the defendant is operating said plant as the agent of the government of the United States and is generating electricity at said plant. [16]

(b) Defendant admits that it has sold in excess of Twenty-five Million Dollars' worth of electricity annually to all of its customers, including some customers engaged in interstate commerce and customers engaged in the manufacture of goods for interstate commerce; admits that some electricity sold by it to customers engaged in interstate commerce and to customers engaged in the manufacture of goods for interstate commerce was used by such customers to carry on their activities in interstate commerce and in the production of goods for interstate commerce, but defendant is without knowledge or information sufficient to form a belief as to the truth of the averment

that the electricity thus used was, during the period set forth in said second amended complaint, in excess of Twenty-five Million Dollars annually, or any other amount.

II.

Specifically answering Paragraph IV of said second amended complaint, defendant denies that any of the said plaintiffs were engaged in processes or occupations necessary to the production, distribution or sale of electrical power by the defendant in interstate commerce, or in processes or occupations necessary to the production, distribution or sale of goods in interstate commerce by customers of the said defendant. In this connection, defendant alleges that at all times mentioned in said second amended complaint, some of the electrical energy generated by it in Arizona was transmitted over its lines to certain of its substations in the State of California where its voltage was reduced, and said power so generated with its voltage so reduced was sold by the said defendant to some of its customers within the State of California. Defendant, at all times mentioned in said second amended complaint, likewise generated electrical power within the State of California which it transmitted to its various substations, and after reducing its voltage, sold it to some of its said customers within the State of California. Defendant, basing its answer further on its information and belief, alleges that all of [17] its said sales of electrical energy were intrastate sales and not interstate sales. Defendant further denies that plaintiffs, other than F. E.

Griffes, M. E. Roach and E. G. Eggers, have ever as employees of this defendant, been engaged, or are now engaged in processes or occupations necessary to the generation or sale of electrical power, whether in interstate commerce or otherwise. Defendant admits that each and all of the said plaintiffs other than F. E. Griffes, M. E. Roach and E. G. Eggers, have at some time since October 24, 1938, and many of them now are engaged as employees of defendant in processes or occupations incident to the distribution of electrical energy within the State of California. Defendant denies that plaintiffs F. E. Griffes, M. E. Roach and E. G. Eggers are now, or have at any time been engaged as employees of this defendant or otherwise, in occupations necessary or incident to the distribution or sale of electrical energy either interstate or intrastate, or otherwise. Alleges that plaintiff F. E. Griffes at all times since October 24, 1938, and the plaintiff M. E. Roach from on or about March 1, 1942, to August 1, 1943, and plaintiff E. G. Eggers from on or about June 1, 1944, have been and now are engaged as employees of defendant in occupations incidental to the generation of electrical power within the State of California.

III.

Specifically answering Paragraph V of said second amended complaint, defendant admits that all of the said plaintiffs have at some time subsequent to October 24, 1938, been employed by the defendant in the capacities set

out in said paragraph. Alleges that the several plaintiffs were employed by the defendant in the capacities alleged in said paragraph at the times as follows: [18]

Name	Classification	Period Since October 24, 1938 During Which Man Employed in Listed Classification
Myron E. Glenn	Substation Operator and Attendant	7/23/40 to 8/19/43
Vernon V. B. Wert	Substation Operator and Attendant	12/1/38 to Present Time
B. E. Moses	Substation Operator and Attendant	Before October 24, 1938 to Present Time
Eugene L. Ellingford	Substation Operator and Attendant	6/12/39 to the Pres- ent Time
Herbert S. Kaneen	Substation Operator and Attendant	10/29/40 to 11/1/43
Howard L. Anderson	Substation Operator and Attendant	1/3/42 to 9/27/43
Charles Stanley Myrenius	Substation Operator and Attendant	4/20/42 to 12/27/42
Harold A. Boynton	Substation Operator and Attendant	Before October 24, 1938 to 8/31/43
E. N. Sweitzer	Substation Operator and Attendant	Before October 24, 1938 to Present Time
Clarence Rogers	Substation Operator and Attendant	9/1/42 to Present Time
		(Note: Entered service 5/1/37 as carpenter, and became mechanic's helper 1/1/40.)
C. C. Blenis	Substation Operator and Attendant	9/25/44 to Present Time
J. A. Henle	Substation Operator and Attendant	9/16/43 to Present Time
Verner Neher	Substation Operator and Attendant	11/17/44 to Present Time
C. R. Frazier	Substation Operator and Attendant	Before October 24, 1938 to Present Time
		[19]
Lawrence E. Jackson	Substation Operator and Attendant	6/22/42 to 12/7/43 2/14/44 to Present Time (Military Leave of Absence)
C. E. Foster	Substation Operator and Attendant	1/8/45 to Present Time

Name	Classification	Period Since October 24, 1938 During Which Man Employed in Listed Classification
Andy G. Austin	Substation Operator and Attendant	9/9/43 to 10/9/44
W. B. Burton	Substation Operator and Attendant	3/23/43 to Present Time
E. K. Dickerson	Substation Operator and Attendant	Before October 24, 1938 to 6/12/42
Oathy G. Horne	Substation Operator and Attendant	4/13/42 to 9/1/44
L. S. Morgan	Substation Operator and Attendant	8/1/42 to Present Time
Marion S. Poston	Substation Operator and Attendant	2/15/43 to 7/18/44
Archie Tregoning	Substation Operator and Attendant	10/1/42 to Present Time
John M. Smith	Primary Service Man	9/7/44 to 4/16/45 4/22/45 to 6/15/45 6/18/45 to 7/1/45
W. H. Culbertson	Primary Service Man	Before October 24, 1938 to 9/1/42
A. L. Honnell	Primary Service Man	Before October 24, 1938 to 2/1/39 2/1/40 to 6/1/41 12/1/42 to Present Time [20]
Paul W. Cockrell	Primary Service Man	2/1/39 to 7/1/41 12/1/42 to 10/29/43
C. C. Prinslow	Primary Service Man	11/12/43 to 4/9/45
J. D. Borden	Primary Service Man	2/1/39 to 4/1/39 12/16/41 to Present Time
L. A. Phinney	Primary Service Man	Before October 24, 1938 to 9/7/44 9/25/44 to 12/31/45
F. E. Griffes	Head Works Tender	Before October 24, 1938 to Present Time
M. E. Roach	Attendant Hydro Electrician	3/1/32 to 8/1/43 8/1/43 to Present Time
E. G. Eggers	Carpenter Head Works Tender	9/1/36 to 6/1/44 6/1/44 to Present Time

IV.

(a) Specifically answering Paragraph VI of said second amended complaint, defendant denies that since October 24, 1938, the said several plaintiffs have frequently been employed by the defendant for certain hours in excess of the work-weeks established by Section 7 (a), (1), (2) and (3) of the Fair Labor Standards Act, hereinafter referred to as the "Act," but admits that said plaintiffs have occasionally been so employed; denies that they have not been paid the compensation equal to or in excess of that provided by said Act for such overtime hours in excess of the work-weeks prescribed by the provisions of said Act. Defendant admits that it kept books and records showing the hours worked and the payments made to its employees, including the plaintiffs. In this connection, defendant [21] alleges its record of the hours worked by the said plaintiffs was based upon the time cards made out by each said plaintiff and returned to defendant. Denies that the books or records of this defendant show any overtime performed by said plaintiffs, or any or either of them, that has not been paid for, or that defendant has in its possession any records or books showing any compensation for overtime or otherwise due to said plaintiffs, or any or either of them, or wages due for services other than such sums as may be due on the next pay-day for current services. In this connection, defendant alleges as follows:

(b) Defendant provided for the employment conditions and hours of work of its employees by bulletins issued from time to time and open to the inspection of all of its employees, the provisions of which bulletins it observed, and by observance, substantially communicated to each of its employees, including each and all of the plaintiffs.

(c) Defendant, in the manner hereinbefore alleged, provided that for the purpose of computing overtime, the annual hourly rate of pay of employees upon a monthly salary should be computed by multiplying the monthly salary by twelve, the number of months in a year, dividing the result by fifty-two, the number of weeks in a year, and dividing the weekly wage thus determined by forty.

(d) Defendant alleges that the plaintiffs listed and described as primary service men were paid a monthly salary, the amount of which provided an hourly wage in excess of that provided for by the Act, and that said salary was paid to and received by each of said plaintiffs as full payment for all services, whether active or inactive, of each said plaintiff except actual overtime services, as hereinafter alleged. Defendant, by the manner hereinbefore alleged, scheduled for five days a week eight hours of work for its primary service men, after which each of said primary service men was free to indulge in any activity he saw fit, except that during certain days he was required to respond to any telephoned emergency calls and was [22] required, if he left his residence, to leave with the defendant a telephone number where he could be reached, and each said plaintiff was paid overtime for any actual service performed by him beyond the total of forty hours per week or outside of his regular scheduled working hours.

(e) Defendant alleges that the plaintiffs described as substation operators and attendants were paid a monthly salary, the amount of which provided an hourly wage in excess of that provided for by said Act; that it was agreed between each of said plaintiffs and the defendant that the said monthly salary should be full payment for normal

services of each said plaintiff, whether active or inactive. Defendant further alleges that the normal active duties required of substation operators and attendants did not ordinarily require in excess of two to five hours a day, and often not more than two to three hours a day; that due to the nature of the work, there were no scheduled hours of work for said substation operators and attendants, each substation operator and attendant being allowed to arrange his own hours of work as he saw fit; that the normal active duties of substation operators and attendants, including these plaintiffs, can ordinarily be performed during the daytime; that each substation operator and attendant was required by defendant to live on the property of the defendant for five days each week in a house located near the substation and rented to him by defendant, in order to be able to render necessary service at any time in case of an emergency; that each substation operator and attendant was permitted to have his family live with him, and during the time he was not required to perform any active service could engage in any activity he desired which did not take him beyond such distance from the substation or his residence as to prevent his being able to hear a signal requiring emergency service. Defendant further alleges that because of the nature of the employment, it was understood and agreed between each said substation operator and attendant and the said defendant [23] that, evaluating the employment as a whole, the inactive duties of each said plaintiff and the normal active duties were the equivalent of eight hours of service. Defendant further alleges that, as hereinbefore alleged, each of said plaintiff substation operators and attendants at all times mentioned herein was paid a monthly salary which, as hereinbefore alleged, was paid and received as compen-

sation for all normal active and inactive services performed by said plaintiffs, but that in order to compensate said substation operators and attendants for extraordinary or emergency active duties, defendant, from on or about January 15, 1942 until on or about December 24, 1943, paid to substation operators and attendants, including such of the plaintiffs as were then in its employ in said capacity, overtime compensation for such extraordinary or emergency active duties as they were called on to perform between the hours of ten o'clock p. m. and eight o'clock a. m., and from on or about December 24, 1943 to the present time, paid such compensation for such services performed after six o'clock p. m. and prior to eight o'clock a. m., said hours being hereinafter referred to, for designation, as "nighttime hours." That the accounting department of defendant computed such overtime compensation in the same manner that it computed overtime compensation of any other operating employee, that is to say, by the method alleged in subparagraph (c) hereof, resulting in overtime payment to each substation operator and attendant for any extraordinary or emergency active duties equal to or in excess of the overtime payments provided for by said Act.

(f) Defendant alleges that the plaintiff, M. E. Roach, described in Paragraph V of the second amended complaint as an electrician, is now so employed, but he was employed as a station attendant at Kaweah plants Nos. 1, 2 and 3 from March 1, 1932, to August 1, 1943. That the plaintiff, E. G. Eggers, described in said Paragraph V as a maintenance carpenter, is now and has been head works tender at Kaweah plant No. 3 from June 1, 1944. That plaintiff, F. [24] E. Griffes, is now, and has been at all times mentioned in said second amended complaint,

head works tender at Kaweah plant No. 1. That the plaintiff F. E. Griffes lives, and for many years has lived in his own home which is near the defendant's property; that the plaintiffs M. E. Roach and E. G. Eggers lived in houses owned by the defendant because there was no suitable residence near their places of work. That each said plaintiff has no scheduled working hours, but is allowed to plan his normal day's work and his lunch hour to suit his convenience. Each said plaintiff is paid a monthly salary, the amount of which provided an hourly rate equal to, or in excess of the hourly rate provided for in said Act, which said monthly salary it was agreed between the defendant and each plaintiff should be full compensation for all normal services, active or inactive, performed by each said plaintiff; that in addition thereto, the said defendant has since May 1, 1941, paid to each said plaintiff overtime compensation which is equal to, or in excess of that provided for by said Act for any emergency service which the said plaintiff has been called on to perform for said defendant between the hours of four-thirty o'clock p. m. and seven-thirty o'clock a. m.; that after four-thirty o'clock p. m. each said plaintiff is, and at all times has been free to engage in any activities he sees fit, but by custom does not leave the immediate vicinity of his residence without first obtaining permission from the station chief.

(g) Defendant further alleges that upon and after the United States Government, through the War Manpower Commission, decreed a forty-eight hour week for all industry in Southern California, said defendant, pursuant to the mandate and directive of the government, required each and all of its operating employees, which included each and all of the plaintiffs in the defendant's service, to work

for six days each week instead of five, and paid each and all of the said plaintiffs herein for the sixth day of work overtime computed as hereinbefore alleged. Defendant alleges that it so paid all the [25] plaintiffs, including the said plaintiffs listed and described as substation operators and attendants, notwithstanding the fact that, as hereinbefore alleged, the active service rendered by each of said plaintiffs during the said sixth day did not require eight hours.

(h) Defendant admits that it has records showing the hours of work of its various employees, including the plaintiffs, and alleges that such records consist of and are based upon the time cards; that the time cards of each plaintiff have been made out and turned in by each said plaintiff, each said time card constituting the representations by each plaintiff making it out as to the time worked by said plaintiff. Defendant denies that any of its records show that there is any compensation due to the said plaintiffs, or any or either of them, or any other of its employees, whether for overtime or otherwise, other than current compensation due on the next pay-day. Denies that there is due, owing and unpaid from the defendant to the said plaintiffs, or any or either of them, compensation for any time which they were employed in excess of the work-weeks established by said Act, or otherwise. Denies that there is any accounting due, or that any accounting should be required by said defendant to said plaintiffs, or to any other employee.

V.

Specifically answering Paragraph VII of said second amended complaint, defendant, on its information and belief, denies that plaintiffs, or any or either of them, are

entitled to a reasonable, or any attorneys' fees, or to liquidated, or any damages, or that there is any sum or amount due or owing to plaintiffs, or any or either of them, whether as wages, damages, attorneys' fees or otherwise.

For a Further, Second, Separate and Distinct Answer and Defense, and by way of a plea of estoppel: [26]

I.

Defendant here repeats, readopts and realleges each and all of subparagraphs (b), (c), (d), (e), (f), (g) and (h) of Paragraph IV of its first answer and defense as fully as though here set forth at length.

II.

Defendant alleges that at all times from and since the effective date of said Act, and for a long time prior thereto, defendant furnished to each and all of said plaintiffs time cards, to be filled in and returned to defendant by each said plaintiff, showing the normal hours worked by each said plaintiff, and the overtime, if any, due to said employee. While defendant knew that the substation operators and attendants were required to remain upon the premises of the defendant, as hereinbefore alleged, and knew of the conditions of employment of F. E. Griffes, M. E. Roach and E. G. Eggers, as hereinbefore alleged, and knew that each of its primary servicemen was required during certain days after the expiration of the scheduled working hours not to leave his residence without advising the defendant where he could be reached by telephone, it had no way of knowing whether plaintiffs had performed overtime service for which they were entitled to compensation under

the Act or the custom or practice of said defendant, established as hereinbefore alleged, except by the said time cards turned in by said plaintiffs. Defendant further alleges that it paid each and all of the plaintiffs the overtime claimed by them. That in any case where any overtime service was actually rendered by any plaintiff and not reported to defendant, defendant had no way of knowing of such overtime service and no record or other evidence upon which to make any overtime payment to said plaintiff. To the knowledge of each and every plaintiff herein, said defendant relied upon the time cards of each of said plaintiffs, and made payment for the regular normal hours [27] of work and for overtime claimed by them upon their said time cards.

III.

Defendant alleges that if any said plaintiff herein performed any active overtime services for the defendant which he did not report to said defendant, defendant had no way of knowing of such overtime work performed by such plaintiff and not reported to defendant. Defendant alleges that if such overtime work so performed by any plaintiff had been reported to defendant, defendant would have paid said overtime and avoided incurring any further obligation or liability to said plaintiff.

IV.

As to plaintiffs designated and described as substation operators and attendants, defendant alleges that each of said plaintiffs reported on the various time cards furnished him as having performed eight hours of service per day, without making any claim for any overtime compensation, except for extraordinary or emergency active services performed during nighttime hours as here-

inbefore defined, although as hereinbefore alleged, none of said plaintiffs actually rendered eight hours of active service during any twenty-four hour period, and knew the defendant knew such to be the fact, and defendant did know such to be the fact and accepted the said time cards as evidence of the recognition by each said plaintiff of the agreement between each said plaintiff and defendant that in evaluating the employment of said plaintiffs as a whole, the inactive duties of each said plaintiff and the normal active duties were the equivalent of eight hours of service. Defendant relied upon said representations on the time cards of each said plaintiff, and each said plaintiff knew that the defendant so relied upon said representations. Defendant further alleges that if any of said plaintiffs had made or advanced any claim at any time that he was entitled to overtime compensation, except for extraordinary or emergency active services performed during the [28] nighttime hours as hereinbefore defined, that defendant would not have continued the employment of any of said substation operators and attendants at the said monthly salaries paid to them, but would have made other arrangements for compensation with them, or with others employed in their place, so as to have avoided any obligation to them or to any other substation operator and attendant for payment beyond their monthly salary and overtime for extraordinary or emergency active services performed during nighttime hours, as hereinbefore defined.

V.

As to the plaintiffs, F. E. Griffes, M. E. Roach and E. G. Eggers, defendant alleges that it relied upon their time cards, and that if any one of the said three plain-

tiffs had at any time by his time card or otherwise claimed or asserted that the custom observed by him of not leaving his residence after four-thirty o'clock p.m. without first communicating with the substation chief constituted any employment beyond eight hours a day or would entitle him to any overtime compensation, said defendant would not have continued the employment of said plaintiffs upon the said basis or salary, but would have made other arrangements with said plaintiffs or others employed in their places so as to have avoided any obligation to them, or any other employee so situated, for payment beyond their monthly salary and overtime for active services performed beyond forty hours a week.

VI.

As to plaintiffs designated and described as primary service men, defendant alleges that defendant paid to each said plaintiff overtime for any and all services performed by each of said plaintiffs in excess of forty hours per week as shown by the time cards delivered to it by each of said plaintiffs; and defendant further alleges that if any of said plaintiffs had made any claim either by time card filed with the said defendant or otherwise, that the requirement that after [29] their normal hours of work they leave a telephone number where they could be reached in case of emergency constituted any employment restraint or entitled them to overtime compensation, said defendant would not have continued the employment of said plaintiffs on said salary basis, and would have made other arrangements with said plaintiffs or others employed in their places to avoid any obligation to them or to any other primary service man for payment

beyond their monthly salary and overtime for actual services performed beyond forty hours per week.

VII.

Defendant alleges it would be inequitable and unjust to now permit said plaintiffs, or any of them, to claim that they had performed any services, active or inactive, for which they were entitled to overtime compensation, or to liquidated damages, or to any other form of compensation, and plaintiffs, and each of them, are estopped and ought not now to be heard to claim that they, or any of them, are entitled to any compensation whatever for any services performed by them for this defendant other than current compensation for the regular hours of work and overtime which may be due upon the next succeeding pay-day.

For a Further, Third, Separate and Distinct Answer and Defense,

I.

Defendant alleges that any award of liquidated damages against defendant as prayed for in this action will operate to deprive the defendant of its property without due process of law, and in violation of the Fifth Amendment to the Constitution of the United States.

For a Further, Fourth, Separate and Distinct Answer and Defense, and by way of plea of the Statute of limitations: [30]

I.

Defendant alleges that the said cause of action is barred so far as any liquidated damages to the plaintiffs Myron E. Glenn, Vernon V. B. Wert, B. E. Moses, Eugene L.

Ellingford, Herbert S. Kaneen, Howard L. Andersen and Charles Stanley Myrenius are concerned, under Subdivision 1 of Section 340 of the Code of Civil Procedure as to any recovery for services prior to March 19, 1944, performed by said plaintiffs or any of them.

For a Further, Fifth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that the said cause of action is barred as to the plaintiffs Myron E. Glenn, Vernon V. B. Wert, B. E. Moses, Eugene L. Ellingford, Herbert S. Kaneen, Howard L. Andersen and Charles Stanley Hyrenius, under Subdivision 1 of Section 339 of the Code of Civil Procedure, as to any recovery for services prior to March 19, 1943, performed by said plaintiffs or any of them.

For a Further, Sixth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that the said cause of action is barred as to the plaintiffs Myron E. Glenn, Vernon V. B. Wert, B. E. Moses, Eugene L. Ellingford, Herbert S. Kaneen, Howard L. Anderson and Charles Stanley Myrenius, under Subdivision 1 of Section 338 of the Code of Civil Procedure, as to any recovery for services prior to March 19, 1942, performed by said plaintiffs or any of them.

For a Further, Seventh, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that the said cause of action is barred [31] so far as any liquidated damages to the plaintiffs, Harold A. Boynton, E. N. Sweitzer, John M. Smith, W. H. Culbertson, F. E. Griffes, Clarence Rogers, M. E. Roach, E. G. Eggers, C. C. Blenis, J. A. Henle, Verner Neher, A. L. Honnell, Paul Cockrell, C. C. Prinslow, J. D. Borden, C. R. Frazier, Lawrence E. Jackson and C. E. Foster are concerned, under Subdivision 1 of Section 340 of the Code of Civil Procedure as to any recovery for services prior to May 1, 1944, performed by said plaintiffs or any of them.

For a Further, Eighth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that the said cause of action is barred as to the plaintiffs Harold A. Boynton, E. N. Sweitzer, John M. Smith, W. H. Culbertson, F. E. Griffes, Clarence Rogers, M. E. Roach, E. G. Eggers, C. C. Blenis, J. A. Henle, Verner Neher, A. L. Honnell, Paul Cockrell, C. C. Prinslow, J. D. Borden, C. R. Frazier, Lawrence E. Jackson and C. E. Foster, under Subdivision 1 of Section 339 of the Code of Civil Procedure, as to any recovery for services prior to May 1, 1943, performed by said plaintiffs or any of them.

For a Further, Ninth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that the said cause of action is barred as to the plaintiffs Harold A. Boynton, E. N. Sweitzer,

John M. Smith, W. H. Culbertson, F. E. Griffes, Clarence Rogers, M. E. Roach, E. G. Eggers, C. C. Blenis, J. A. Henle, Verner Neher, A. L. Honnell, Paul Cockrell, C. C. Prinslow, J. D. Borden, C. R. Frazier, Lawrence E. Jackson and C. E. Foster, under Subdivision 1 of Section 338 of the Code of Civil Procedure, as to any recovery for services prior to May 1, 1942, performed by said plaintiffs or any of them. [32]

For a Further, Tenth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that the said cause of action is barred so far as any liquidated damages to the plaintiffs, Andy G. Austin, W. B. Burton, E. K. Dickerson, Oathy G. Horne, L. S. Morgan, Marion S. Poston, L. A. Phinney and Archie Tregoning, are concerned, under Subdivision 1 of Section 340 of the Code of Civil Procedure as to any recovery for services prior to June 15, 1944, performed by said plaintiffs or any of them.

For a Further, Eleventh, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that the said cause of action is barred as to the plaintiffs Andy G. Austin, W. B. Burton, E. K. Dickerson, Oathy G. Horne, L. S. Morgan, Marion S. Poston, L. A. Phinney and Archie Tregoning, under Subdivision 1 of Section 339 of the Code of Civil Procedure, as to any recovery for services prior to June 15, 1943, performed by said plaintiffs or any of them.

For a Further, Twelfth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that the said cause of action is barred as to the plaintiffs Andy G. Austin, W. B. Burton, E. K. Dickerson, Oathy G. Horne, L. S. Morgan, Marion S. Poston, L. A. Phinney, and Archie Tregoning, under Subdivision 1 of Section 338 of the Code of Civil Procedure, as to any recovery for services prior to June 15, 1942, performed by said plaintiffs or any of them.

Wherefore, defendant prays that plaintiffs take nothing by this action, for its costs of suit herein, and for such other and [33] further relief as to the court may seem just in the premises.

GAIL C. LARKIN,
E. W. CUNNINGHAM,
ROLLIN E. WOODBURY,
NORMAN S. STERRY,
GIBSON, DUNN & CRUTCHER,

By Norman S. Sterry

Attorneys for defendant Southern California
Edison Company, Ltd.

Received copy of the within Answer this day of August, 1945. David Sokol, Attorney for Plaintiffs.

[Endorsed]: Filed Aug. 31, 1945. Edmund L. Smith,
Clerk. [35]

[Title of District Court and Cause]

INTERROGATORIES

To the Defendants, Southern California Edison Company,
Ltd.,

Please furnish written answers under oath for the following interrogatories:

1. State the hours worked by each of the plaintiffs and plaintiffs-interveners during each workweek between March 19, 1942, and the date hereof.

2. State the sums paid by the defendant Company to each plaintiff and to each intervener for each such workweek, and the hourly rate and/or other basis upon which such sums were figured.

3. State the nature of the work or duties performed by each plaintiff and by each plaintiff-intervener while employed by [36] the defendant Company during each workweek in the period from March 19, 1942, to the date hereof.

4. State between what hours of the day plaintiffs and plaintiffs-interveners who were station or substation employees were required to put in their normal day's work.

5. State whether or not the plaintiffs and plaintiffs-interveners who were station or substation employees were required after their normal day's work, to remain on the premises of the station or substation or other premises of the defendant Company; and if so, what duties, if any, were such plaintiffs and plaintiffs-interveners required to perform during the period when they were required to remain on the defendant Company's premises after their normal day's work during each workweek since March 19, 1942.

6. State whether or not at any time since March 19, 1942, there have been posted in any of the defendant Company's stations or substations, in station instruction books or log books, or on walls, doors, windows, screens, or elsewhere, notices setting forth the schedule of hours to be worked by employees at any such stations or substations; and, if at any time since March 19, 1942, such notices were removed after having been posted in any of the manners or methods or places above indicated, state when they were so removed and upon whose instructions.

7. State between what hours of the day plaintiffs John M. Smith, W. H. Culbertson, A. L. Honnell, Paul W. Cockrell, C. C. Prinslow, J. D. Borden, and L. A. Phinney, all of whom have been employed by the defendant Company as primary service men, were required to put in their normal day's work, during each workweek since March 19, 1942. [37]

8. State whether or not the plaintiffs listed in interrogatory No. 7 above as primary service men were required, after their normal day's work, to hold themselves on call or to remain on the defendant Company's premises; and if so, why were such plaintiffs required to remain on call or on defendant Company's premises after their normal day's work during each or any workweek since March 19, 1942.

9. State between what hours of the day plaintiff F. E. Griffes, who has been employed by the defendant Company as head works tender, was required to put in his normal day's work during each workweek since March 19, 1942.

10. State whether or not plaintiff F. E. Griffes was required, after his normal day's work, to remain either on call or on the premises of the defendant Company, and if so, why was plaintiff Griffes required to remain on call or to remain on the defendant Company's premises after his normal day's work during each or any workweek since March 19, 1942.

11. State between what hours of the day plaintiff M. E. Roach, who has been employed by the defendant Company as hydro station attendant and electrician, was required to put in his normal day's work during each workweek since March 19, 1942.

12. State whether or not plaintiff M. E. Roach was required, after his normal day's work, to remain either on call or on the premises of the defendant Company; and if so, why was plaintiff Roach required either to remain on call or to remain on defendant Company's premises after his normal day's work each or any workweek since March 19, 1942. [38]

13. State between what hours of the day plaintiff E. G. Eggers, who has been employed by the defendant Company as head works tender, was required to put in his normal day's work during each workweek since March 19, 1942.

14. State whether or not plaintiff E. G. Eggers was required after his normal day's work either to be on call or to remain on the premises of the defendant Company, and if so, why was plaintiff Eggers required to be either on call or to remain on the premises of the defendant Company after his normal day's work during each workweek since March 19, 1942.

15. State what orders, instructions, bulletins, directions, instruction sheets, etc., have been issued by defendant Company to substation employees, water tenders, works tenders or head works tenders, and primary service men, in effect since March 19, 1942, and dealing with matters of duties, responsibilities and hours of work required of them. (This interrogation may be replied to by the furnishing of copies of such documents.)

16. State whether or not the plaintiffs and plaintiffs-interveners during their employment by defendant Company, engaged in work necessary to the production and distribution of goods in interstate and/or foreign commerce; and if not, answer the following interrogatories, numbered 16-a to 16-m inclusive.

16-a. State what is the area served by each station or substation where the plaintiffs and plaintiffs-interveners were or are employed.

16-b. State the names of the customers other than house- [39] holds in each of the areas so serviced.

16-c. State the origin of the electric power coming into, and the destination of the electric power as it is distributed from each station or substation where any of the plaintiffs and plaintiffs-interveners have been employed at any time since March 19, 1942.

16-b. State how and in what respect the stations or substations at which any of the plaintiffs and plaintiffs-interveners are or have been employed since March 19, 1942, are connected with other facilities and operating parts of the defendant Company.

16-e. State the names of the defendant Company's customers, other than households, who are or have been serviced since March 19, 1942, by the defendant Company's primary servicemen John M. Smith, W. H. Culbertson, A. L. Honnell, Paul W. Cockrell, C. C. Prinslow, J. D. Borden, and L. A. Phinney, all plaintiffs in this action.

16-f. State the destination of the electric power generated by means of the water tended by plaintiff head works tender, F. E. Griffes, since March 19, 1942.

16-g. State whether or not the stations and substations at which were employed or now are employed any of the plaintiffs and plaintiffs-intervenors, were and now are so integrated with the rest [40] of the physical processes and functional facilities of the defendant Company's operations so that said stations and/or substations were and are part of the entire system of transmission, generation, and distribution of electric power by the defendant Company; and if not, state what connection, if any, said stations and/or substations have with the generation or transmission, or distribution of electric power by the defendant Company.

16-h. State whether or not the entire Edison system, including substations and hydro stations, is an interlocking and inter-connected system involved as a unit in the generation and distribution of electric power by the defendant Company.

16-i. State whether or not there is any method of determining which of the power comes, day by day, and week by week, from within the State of Cali-

fornia, and which comes from without the State of California.

16-j. State whether or not when there have been breakdowns in the transmission and generation system of the defendant Company within the State of California, the Company's apparatus automatically transfers transmission and/or generation over to the Boulder Dam Lines.

16-k. State whether or not electric power from any source may go anywhere in the system, of defendant company.

16-l. State whether or not the power generated in [41] the Company's generation plants and centers pours into central distributing points serving the system as a whole of defendant company.

16-m. State whether each operating unit of the defendant Company is independent, or whether it depends for help, assistance, operation, and function on some other operating part or parts of the defendant Company.

17. Set forth what, if any, Manual of Instructions for Substation Operators has been in effect since March 19, 1942, for each substation.

18. Set forth what, if any, Dispatcher's Bulletins have been in use for each substation since March 19, 1942.

19. Set forth the records from the Log Books of each substation at which plaintiffs and plaintiffs-intervenors worked since March 19, 1942, showing calls and duties after 5:00 P.M. and after the normal working day.

20. (a) State what services or duties are designated by the defendant company as "active services."

(b) State what services or duties are designated by the defendant company as "inactive services."

(c) Set forth the bulletin or other instruction sheet in whatever form in which appears the foregoing definition of active vs. inactive duties or services.

Dated, Los Angeles, October 15, 1945.

DAVID SOKOL

Attorney for Plaintiffs and Plaintiffs-Interveners [42]

[Affidavit of service by mail.]

[Endorsed] Filed Oct. 23, 1945. Edmund L. Smith,
Clerk. [43]

[Title of District Court and Cause]

ANSWER AND OBJECTIONS TO INTERROGA- TORIES PROPOUNDED BY THE PLAINTIFFS

Comes now the defendant and files its answer and objections to the interrogatories propounded by the plaintiff:

Explanation to Answers

Many of the interrogatories seek information as to the hours of work, rate of pay, etc., of the plaintiffs and plaintiff-interveners with reference to the respective job classifications which it is alleged the respective plaintiffs and plaintiff-interveners held. Many of the plaintiffs and plaintiff-interveners have, during the period inquired of, to-wit: from March 19, 1942 to the date of the filing of these answers, worked at different periods in other job classifications. As there is no allegation that any compensation or damages is due to any of said plaintiffs or plaintiff- [44] interveners for such other work, it

is assumed by the defendant that there is no claim made therefor, and all answers, regardless of their form, have been limited to the work by the plaintiffs and plaintiff-intervenors in the respective job classifications alleged to have been respectively held by them.

In many of the answers it has also been thought advisable to make separate answers as to the plaintiffs and plaintiff-intervenors in their separate classifications of work, this by reason of the factual differences in the various classifications and because of the fact that a supervisor of one of defendant's departments could not properly verify an answer dealing with all job classifications not under his supervision. To that end, several verifications of the answers have been thought necessary, limited by each affiant to the men working under the particular division of defendant of which he is in charge.

1. Answer to Interrogatory No. 1—

(a) Substation Operators and Attendants: The Company has no records of the hours worked by any of the plaintiffs and plaintiff-intervenors classified as Substation Operators and Attendants during the time inquired of, from March 19, 1942 to the date hereof, except such as are made up from the time cards made out by said employees themselves. These records show that except in the case of absence from work because of illness, vacation or other cause, each of said Substation Operators and Attendants performed services of eight hours per day for five days per week, and such overtime services as such individual employees reported.

Commencing on or about December 1, 1943 and until September 1, 1945, the Company, pursuant to the directives of the United States Government through its proper authorities declaring Southern California a critical labor

area and decreeing a forty-eight hour week, required Substation Operators and Attendants to remain in attendance [45] at their said stations for six days a week, for which they were paid overtime for eight hours and which was normally carried and shown on their time cards as overtime. They were also during said period paid overtime for any active services performed during the hours defined therein as night-time hours, as in said answer alleged.

See, also, in further explanation, defendant's answer to Interrogatory No. 4.

(b) Hydro-Plant Attendants and Headworks Tenders: All of the plaintiffs and plaintiff-interveners who are classed as Hydro-Plant Attendants and Headworks Tenders were considered by the Company to be week-period employees on monthly salary. The active work required of such classified employees ordinarily would take from four to eight hours per day, depending on local conditions. The only records which the Company has of the hours worked by each such employee are taken from the time cards made out by the employee himself and sent to the Company. Each said employee, during the time between March 19, 1942 and the present date, has filed time cards showing (except where absent for personal reasons) eight hours of service for each day on duty, and prior to November 1, 1943, five days per week on duty, or forty hours per week, and between November 1, 1943 and September 1, 1945, six days per week or forty-eight hours per week, plus overtime shown by the individual reports.

In addition to the monthly salary, the Company has paid to each of said employees overtime for all hours of service reported in excess of forty per week for any

work week, and, in addition thereto, overtime for any active service performed between the hours of 4:30 P. M. and 7:30 A. M.

Commencing on or about the 1st day of November, 1943 and until September 1, 1945, pursuant to the directives of the United States Government declaring Southern California a critical labor area and requiring a 48-hour work week, the above employees were required to work six days per week instead of five, said employees [46] reporting time in excess of forty hours per work week as overtime.

(c) Primary Servicemen: The plaintiffs and plaintiff-intervenors listed as Primary Servicemen were employed on a monthly salary and were required to perform eight hours of service for the Company for five days per week. The time of those hours varied with the district, being from 8:30 A. M. to 12:30 P. M., and 1:30 P. M. until 5:30 P. M., or from 8:00 A. M. to 12:00 noon, and 1:00 P. M. until 5:00 P. M. In addition, Primary Servicemen were paid overtime for any services performed outside of such hours. Each said Primary Serviceman made out his own time report, and each such report during the time inquired of, to-wit: from March 19, 1942 until the date hereof, with the exception of times any of said plaintiffs and plaintiff-intervenors were absent because of sickness, vacation or other cause, shows forty hours of service per work week, plus the overtime shown by the individual reports of the said plaintiffs and plaintiff-intervenors. The sixth day of the period during which the Primary Servicemen were on a forty-eight hour week was reported, and is shown by the Company's records, as overtime.

2. Answer to Interrogatory No. 2—

The Company cannot answer as to the amount paid to the plaintiffs and plaintiff-intervenors by the week, as it did not hire or pay any of the said plaintiffs or plaintiff-intervenors by the week. All were hired and paid by the month. In converting the monthly salary to an hourly rate for the purpose of overtime, the defendant multiplied the monthly salary by 12, the number of months in the year, and divided the result by 2080, the same being 52 (the number of weeks in a year) times 40 hours per week.

As there are a different number of working hours in each month, the Company, for the purpose of converting the monthly salary to an hourly rate for the purpose of distribution and for deductions in the case of absence from work, divided the monthly salary by the number of working hours in the particular month. [47]

The amounts earned by each plaintiff and plaintiff-intervenors from March 19, 1942 to and including October 31, 1945, in the specified job classifications alleged by them, are shown by exhibits or schedules filed herewith, which also show any deductions for absence from work and all overtime paid. The final column shows the total amount earned, which amount was paid the employees, less deductions required by State and Federal law and other authorized deductions.

While the interrogatory calls for information from March 19, 1942 to the date of the filing of the answers, it is impossible at the time of preparing the answers so as to be able to file them on December 5, 1945, to carry such information beyond the 31st day of October, 1945.

As indicated in the explanation preceding all the answers and by the third paragraph of this answer, the schedules

show only the earnings of the plaintiffs and plaintiff-intervenors while working in the particular job classifications alleged, and do not reflect the earnings of any of them when working during the period inquired of from March 19, 1942 to October 31, 1945, in other classifications alleged, nor do they show the earnings of any of the plaintiffs or plaintiff-intervenors while classified as Substation Operators and Attendants while working in a substation operated on three shifts.

3. Answer to Interrogatory No. 3—

(a) Substation Operators and Attendants: The duties of plaintiffs and plaintiff-intervenors classified as Substation Operators and Attendants were, during the period inquired of, to-wit: March 19, 1942, to the date hereof, substantially to inspect stations daily, report to switching center, take instrument and battery readings and record same, and maintain daily log and other operating reports; to perform routine and emergency switching of power lines in accordance with telephoned orders from their switching center [48] and written instruction; to keep in order the station building and at some stations do necessary painting of cottage in which he lives; to maintain lawns and grounds around station and cottage in which he lives. Some Substation Operators and Attendants are required to answer customer telephone calls and report the same to the Primary Servicemen or switching centers.

See, also, defendant's Answer to Interrogatories Nos. 4, 5 and 20.

(b) Hydro-Plant Attendants and Headworks Tenders: In brief, the duties of the Hydro-Station Attendant are to attend turbines and generator, make routine inspection of power-plant equipment, perform necessary manual

operations of hydraulic and electrical equipment in starting, stopping and clearing equipment for work, clean and lubricate turbines, generators and auxiliary equipment; to read and record various indicating instruments and maintain daily logs; to perform miscellaneous work in maintaining appearance of station and camp and related work as required.

In brief, the duties of the Headworks Tender are to attend to and operate equipment installed at intakes of hydro-plants for control of water flow, patrol water-flow lines to inspect for leaks, breaks and general conditions, service and lubricate gate mechanism, clean trash rack and sluices sand; maintain yard and local trails, make simple oral reports of weather, flow conditions and related work as required.

(c) Primary Servicemen (Santa Paula District—John M. Smith, W. H. Culbertson and L. A. Phinney; Huntington Beach District—A. L. Honnell, P. W. Cockrell and C. C. Prinslow): Maintains service on distribution lines and street light circuits in his district, makes emergency repairs to restore interrupted service, and patrols lines to note conditions hazardous to continuous service, restores service by replacing primary and secondary fuses. As instructed by switching center, switches and parallels circuits in unattended [49] substations, patrols street lights in his district, an average of one night a week.

Vernon City District—J. D. Borden:

Maintains service on distribution lines and street light circuits in his district, makes emergency repairs to restore interrupted service, and patrols lines to note conditions hazardous to continuous service, restores service by replacing primary and secondary fuses. As instructed by switching center, switches and parallels circuits in

unattended substations, patrols street lights in his district twice a week when on P. M. schedule and answers fire calls in Vernon City area.

4. Answer to Interrogatory No. 4—

(a) Substation Operators and Attendants: All of the plaintiffs and plaintiff-interveners classified as Substation Operators and Attendants were, during the period inquired of, to-wit: March 19, 1942 to the date hereof, employed by the Company upon a monthly salary which the Company believes and contends was payment for any and all services performed by them, however legally classified. They were required to live upon the defendant's premises for five days of the work week except between December 1, 1943 and September 1, 1945, when they were required to live upon the premises six days of the work week. They had no scheduled working hours and were subject to call during twenty-four hours per day during the regular scheduled working days. The active duties which were required of them would not take more than two to five hours per day, and the Company believes and contends that their entire employment was regarded by them and by the Company as the equivalent of the employment of eight hours of active service. At all of the defendant's stations certain hours were designated when readings were to be taken and reports were to be made to the switching center. These hours varied as between the various stations.

See, also, defendant's Answer to Interrogatory No. 20 and [50] to subdivision (a) of its Answer to Interrogatory No. 5.

(b) Hydro-Plant Attendants and Headworks Tenders: Hydro-Plant Attendants and Headworks Tenders are classed as week-period employees with no regular schedule

of working hours. Usually, however, they are expected to perform their active work between 7:30 A. M. and 4:30 P. M., with one hour off for lunch. When they are called on to perform any active work after 4:30 P. M. and before 7:30 A. M., they were paid overtime for the time which they reported.

5. Answer to Interrogatory No. 5—

(a) Substation Operators and Attendants: See defendant's Answers to subdivision (a) of Interrogatory No. 4 and to Interrogatory No. 20.

Plaintiffs and plaintiff-intervenors who were Substation Operators and Attendants were required as a part of their job, during five days a week, except between December 1, 1943 and September 1, 1945, when they were required during six days a week, to remain at or near their homes or living quarters located on or adjacent to the substation premises, in order to answer alarms or emergency calls.

(b) Hydro-Plant Attendants and Headworks Tenders: See defendant's Answers to subdivision (b) of Interrogatory No. 4 and to Interrogatory No. 20.

Hydro-Plant Attendants were required during five days a week, except between November 1, 1943 and September 1, 1945, when they were required six days a week, to live on defendant's premises in order to answer alarms or emergency calls.

Headworks Tenders were required during five days a week, except during said critical period from November 1, 1943 to September 1, 1945, when they were required six days a week, to live either on or reasonably near the Headworks in order to be able to answer alarms and emergency calls.

Both such employees could leave their residence after 4:30 [51] P. M. to attend to any personal matter on obtaining permission so to do from the Station Chief. During the last eighteen months this permission has been granted as a matter of course and refused only when local conditions did not permit. Prior to that it was granted only in the case of an emergency.

6. Answer to Interrogatory No. 6—

(a) Substation Operators and Attendants: There was in each substation a substation departmental letterbook containing bulletins from the substation division and departmental orders, bulletins and instructions. In each substation there was also a folder of station instructions (prepared by the station attendant, sometimes referred to as the "Station Chief"). Said instruction book was not posted but was available for inspection by the Substation Operators and Attendants.

In addition thereto, at many of the stations there was posted from time to time a schedule of the days to be worked by the various operators. These would necessarily be changed from time to time and records of them have not been retained.

In each substation there was also a log book kept, in which the Substation Operator and Attendant, or operators and attendants, as the case might be, were supposed to note the various readings and switch operations performed by them. So far as can be ascertained, no bulletins have been posted. The station instructions and departmental letters and books have from time to time been revised and the letters or instructions superseded have not been preserved. In some of the stations some of the log books have recently been removed to the office of Superintendent of Substations for the purpose of making compilations as requested by counsel for plaintiffs.

(b) Hydro-Plant Attendants and Headworks Tenders: So far as can be ascertained, no notice has been posted at any time which sets forth any schedule of hours to be worked by the plaintiffs and [52] plaintiff-intervenors. However, a work schedule is posted on the bulletin board of the Canyon office which shows the days on which each employee is on duty and also the employee's regular days off.

7. Answer to Interrogatory No. 7—

(c) Primary Servicemen: The hours required of the Primary Servicemen named in Question No. 7 are as shown in the Answer to subdivision (c) of the first Answer. It is impossible to state the time more definitely due to the fact that the schedules of work were made up in each district monthly and were changed from time to time as local conditions required and no record of them kept. Hence, the normal working hours would depend upon the district, time and the place, but were eight hours per day within the hours specified in subdivision (c) of the first Answer.

8. Answer to Interrogatory No. 8—

(c) Primary Servicemen: The employees referred to in Question No. 8 and listed in No. 7 were not required at the end of their normal eight hours of work to remain upon the Company's premises, but could return to their own homes or go any other place they saw fit and engage in any activities they saw fit, the only requirement being that on their scheduled work days, if they left their homes, they were required to inform the switching center where they could be reached by telephone in order to be available in the event their services would be required in case of trouble in the area in which they worked.

9. Answer to Interrogatory No. 9—

(b) Hydro-Plant Attendants and Headworks Tenders: There was no schedule of hours in which the plaintiff, M. E. Griffes, performed the normal duties of his employment as set out in Answer to 3 (b). As stated, he was paid overtime for such time as he [53] reported for any emergency work he was called on to do by the Company after 4:30 P. M. and before 7:30 A. M.

10. Answer to Interrogatory No. 10—

(b) Hydro-Plant Attendants and Headworks Tenders: See Answer to 5 (b).

11. Answer to Interrogatory No. 11—

(b) Hydro-Plant Attendants and Headworks Tenders: Ordinarily M. E. Roach would perform his normal active duties between 7:30 A. M. and 4:30 P. M., with one hour off for lunch, but the times within which such duties could be performed were occasionally varied by the Station Attendants with permission of the Station Chief.

See, also, Answer 5 (b).

12. Answer to Interrogatory No. 12—

(b) Hydro-Plant Attendants and Headworks Tenders: See Answer to 5 (b).

13. Answer to Interrogatory No. 13—

(b) Hydro-Plant Attendants and Headworks Tenders: There was no schedule of hours in which the plaintiff, E. G. Eggers, performed the normal duties of his employment as set out in Answer to 3 (b). As stated, he was paid overtime for such time as he reported for any emergency work he was called on to do by the Company after 4:30 P. M. and before 7:30 A. M.

14. Answer to Interrogatory No. 14—

(b) Hydro-Plant Attendants and Headworks Tenders:
See Answer to 5 (b). [54]

15. Answer to Interrogatory No. 15—

(a) Substation Operators and Attendants: Dispatcher's bulletins in each of the stations involved, substation departmental letter-book referred to in subdivision (a) of defendant's Answer to Interrogatory No. 6, station instructions, certain orders of the Comptroller's Department, operating departmental orders and substation division orders.

(b) Hydro-Plant Attendants and Headworks Tenders: Station instructions and dispatcher's bulletins are on file at hydro-plants and in the General Office. In addition, there were in the Station Chief's office, available to the inspection of any of said employees, bulletins and orders from the Comptroller's Department and departmental orders.

(c) Primary Servicemen: As to Primary Servicemen, no bulletins or instruction sheets or written orders have been issued within the period inquired of except as follows:

(1) In each district there is kept by the Primary Servicemen a switching procedure book which gives instruction on the operation of individual circuits in cases of emergency. Instructions and maps are available for the Primary Servicemen to parallel or open certain sections that are in trouble. These books vary in each district, there being thirty-one districts. Each book contains from fifteen to forty pages which have been changed from time to time to meet varying conditions in the respective districts, records not being kept in the general office, and,

as a general rule, when any change is made, the page so changed is not preserved.

(2) The general bulletin by the Superintendent of Distribution of the district of January 14, 1943, instructing Primary Servicemen to keep a log of overtime, the purpose of the said bulletin being to obtain data to see if additional servicemen were needed at any of the said districts.

(3) A bulletin of April 4, 1944, by the Superintendent [55] of Distribution revoking the direction in the bulletin of January 14, 1943.

(4) A bulletin issued by the Superintendent of Distribution on September 25, 1945, after his attention had been called to certain depositions in this case in which certain of the plaintiffs and plaintiff-interveners had made statements which he considered incorrect.

16. Answer to Interrogatory No. 16—

The defendant objects to answering Interrogatory No. 16 on the ground that it calls purely for a conclusion, which is to be drawn from the law which the Court finds applicable to the facts which it determines to be true.

16-a. Answer to Interrogatory No. 16-a—

The defendant objects to answering this question upon the ground that it would require an unreasonable expenditure of time and money so to do, and that the question is not susceptible of definite or accurate answer.

This question cannot be answered accurately since there are interconnections between some of the stations at distribution voltages. Under such conditions, the load area boundaries will shift with changing loads to such an extent that a great number of load studies would have to be made in order to give the determination.

However, most of the stations in question are not interconnected by distribution voltage lines, and maps can be prepared which will bound the areas served by each station. Since the boundary lines are not straight lines, and line sections are at times switched from station to station, and considerable overlapping occurs, a field check would be required to map accurately the area served by each station. The time required for such a field check and area map, according to the best estimate possible to be made, would be, per station: [56]

Prepare the Area Map . . .	24 Man Hours
Field Check . . .	40 Man Hours
<hr/>	
Total per Station . . .	64 Man Hours
Total 65 Stations . . .	4160 Man Hours

Assuming that the men are available for such work, the estimated cost to the defendant would be \$5,865.00. The area maps would be prepared by the Map Department reporting to the Superintendent of Distribution, and the field check would be made by the local District organization who also report to the Superintendent of Distribution.

There are maps available in the general office file of the Superintendent of Distribution which map the area comprising each of the Company's geographical districts. The Company's substations in question are approximately located on these maps. The area served by each station can be generally, but not definitely, ascertained by the use of the district maps. There are 31 district maps, with between three and four stations shown on each of said maps.

16-b: Answer to Interrogatory No. 16-b—

The defendant objects to answering the question upon the ground that it would take an unreasonable expenditure

of time and money to answer the same, and that the question is not susceptible of definite or accurate answer.

The defendant has records of its customers, but the names are not to be found in any single book or in any centralized record. Each district has a meter record of its own customers and an alphabetical file index of their names, residence or place of business and their classification. The Company cannot, without an expenditure of approximately 270 manhours, at an estimated cost of \$230.00, furnish an unclassified list of its customers, and it cannot, without an estimated expenditure of approximately 15,800 man hours, at an estimated cost of \$21,250.00, exclusive of the time and cost necessary to prepare maps therefor, give such lists of its customers served by each substation. The records of its customers are kept without any [57] reference to the substations serving such customers, and any one substation may serve customers in one, two or three commercial districts. On one side of the street the customers may receive power that has passed through one substation, and on the other side of the street through another substation which may be in a different district. In order to determine the names of the customers served by each substation, area maps would have to be prepared necessary to answer Interrogatory No. 16-a accurately; then a field check would have to be made by local commercial district organizations using such area maps, and from such check, lists prepared of customers, except householders, in each, and the lists field-checked against the area maps, with particular emphasis at points of overlapping areas. Furthermore, due to "connects" and "disconnects" and some switching of line sections between stations, the lists would be correct only at the time the check was made, and might easily become substantially incorrect or inaccurate at any later time, and

would not necessarily be correct or accurate as to any preceding time.

16-c. Answer to Interrogatory No. 16-c—

The Edison main transmission and generating system consists of three major sources of power interconnected by 220,000 volt transmission lines. The three major sources are Big Creek, Long Beach Steam Plant, and Boulder Dam. There are in addition several small generating plants within the State of California. Each of the substations involved is so constructed that it may receive power from the three major sources. The San Joaquin Valley Area stations of Porterville, Strathmore, Terra Bella, Tipton, Tulare, Venice Hill, Venida, Visalia, Woodville, Delano, Earlimart, Goshen and Lindsay, are operated at 60 cycles, and are normally mechanically attached to the balance of the system through the shafts of frequency changer sets, so that the electricity received by the above named stations is electricity generated by the frequency changers. The frequency changers are operated normally by power received from Big Creek, but [58] during the time inquired of have been operated by electricity flowing from Boulder and from the Long Beach Steam Plant.

When electricity is not received at the above named San Joaquin Valley Substations through the frequency changers, it is received from an isolated 220,000 volt line supplied by Big Creek generators which are temporarily operated at 60 cycles or from 60 cycle generating sources in their immediate area. With the exception of a few isolated customers who are also served through frequency changes, the balance of the system is operated at 50 cycles.

All of the stations other than the above named San Joaquin Valley Substations have at various times received electricity from all three major sources above enumerated. It is impractical, and practically impossible, to give the source of power supplying the various substations due to the fact that as indicated they may receive power from all three major sources, and frequently do receive from all three sources at varying hours during each day. It is impossible to determine the source of power of any substation except on an hour to hour basis, by examination of the readings on the meters which are read and recorded half-hourly at the major generating plants and hourly at the principal substations.

To determine the source of power of the 65 substations involved for any one hour would take about five manhours by a person experienced in the examination of the readings. Since there are over 31,000 hours in the period inquired of from March 19, 1942 to date, it would require in excess of 155,000 manhours to answer the questions as to the source of power of each of the substations involved. The estimated cost to defendant, if it had the personnel available, would be a minimum of \$285,200.00. Further, any employees of the defendant qualified to do such work could not be released for it, as they have other duties which it is necessary for them to perform, and for which the defendant could not at the present time find other employees.

It is not possible to determine the destination of power [59] leaving each substation at any given time as the customers' meters which are read, some monthly and some bi-monthly, do not differentiate between sources of power, whereas in any one of the substations involved this power may be received during one hour of the day from one, two or all three sources.

16d. Answer to Interrogatory No. 16-d—

If the question means as to whether the various substations at which any of the plaintiffs or plaintiff-intervenors have worked are interconnected, the answer is: The power from the Company's major sources of generation is conducted over high voltage transmission lines to ten principal distributing substations. At two of the ten principal substations, the supply voltage is transmitted to the frequency changers as stated in the preceding answer. At the remaining principal substations, the supply voltage is transformed to a lower transmission voltage, and transmitted over a combination of radial and parallel lines to most of the stations in question, most of which are secondary distributing substations. The stations of Bixby, Fairfax, Redlands, Redondo and Yucaipa are supplied by relatively low voltage transmission or distribution voltage lines radiating from the secondary distributing substations, and perform the same relative function as the secondary distributing substations except transform to a lower distribution voltage. Hanford, a distributing substation of a class similar to Bixby, has no connection with other Company facilities and is supplied by purchased power.

Each such station functions slightly different from the other in that some are fractionally used for switching transmission voltage lines. In general, each of the stations receives power from a generating source by way of transmission lines supplied from intermediate principal distributing substations or secondary substations, transforms power to lower distribution voltage, and distributes it through switches to distribution or low voltage lines which, in turn, [60] carry the power to the consumer or to other lower voltage substations.

16-e. Answer to Interrogatory No. 16-e—

This question cannot be specifically or definitely answered and can be only partially answered.

Defendant objects to making a partial answer on the ground that it would require an unnecessary and unreasonable expenditure of time and money on its part.

The reason that it cannot be specifically answered is that the work of the primary service man is to repair trouble on any of the lines in his district. This repair work consists generally of two classes: (1) Repairs which are made in his normal eight hours of work. As to such work, he is usually furnished with written orders. These are in the Commercial Department. (2) Emergency repairs which he may be called upon to make during either his normal hours of work or during the night time.

During the night time he has no more than a telephone or radio instruction as to the trouble reported by some customer within his district. Normally, records of emergency calls during the daytime are preserved in the Commercial Department. Some of the switching centers in the district have turned in to the Commercial Department their records of emergency calls which have been given to Primary Servicemen by telephone or radio, as stated, and some have not. No record has been preserved of extreme emergencies during either the day or night. To illustrate: During severe storms or emergency conditions trouble reports are made out on sheets of paper and transmitted to the Primary Serviceman by telephone or radio. When he makes the repairs, he checks by telephone or radio with the Switching Center or his superintendent against the sheets, which thereafter are not preserved. The orders on file in the Commercial Department would necessarily permit only an incomplete answer, as they would

not show the numerous emergency repairs made by the Primary Serviceman. [61] Likewise, from an examination of these records, it would often be impossible to state what customers the Primary Serviceman had served, as repair on a line might affect all the customers on that line, and the customers on the line today might not be the same as at the time of the repair.

The best estimate that can be made of the time which it would take to make an answer based upon the records is a minimum of 200 hours, at an estimated cost of \$200.00. This is arrived at upon the estimate that it would take a minimum of 120 manhours to go through the files of the Commercial Department and pull out or segregate the various orders involved, and that if they did not average more than two customers per order, 80 additional manhours would be necessary to check these customers. If more than an average of two customers per order would be involved, the time required would be increased.

16-f. Answer to Interrogatory No. 16-f—

The water tended by Headworks Tender F. E. Griffes generates power at Kaweah No. 1 Hydro Plant. This is a small plant of 2,000 kilowatt capacity. It is not possible to give the names of the customers supplied with electricity generated by this plant since it mixes with power generated at the Kaweah No. 2 and No. 3 Hydro Plants. However, due to local area load requirements, no power generated by Kaweah No. 1 is transmitted outside of Tulare County, California.

16-g. Answer to Interrogatory No. 16-g—

The substations have nothing to do with the generation of electrical energy but they are a part of the defendant's system of transmission and distribution of electrical energy

and, as shown by the preceding answers, are so connected that they each and all are capable of receiving and distributing electrical energy from any of the three principal sources of generation except as noted in defendant's Answer to Interrogatory 16-c. [62]

16-h. Answer to Interrogatory No. 16-h—

Defendant's substations are not interlocked. Many of the substations cannot serve other substations. The Edison system is normally operated with generating sources and 220,000 volt transmission lines in parallel as an interconnected system. The 66,000 volt transmission lines radiating from the principal substations are not operated in parallel with the 66,000 volt lines radiating from another of the principal substations. The low voltage distribution lines from one substation are not operated in parallel with distribution lines from another substation except in special cases. Furthermore, the San Joaquin Valley Area Stations of Porterville, Strathmore, Terra Bella, Tipton, Tulare, Venice Hill, Venida, Visalia, Woodville, Delano, Earlimart, Goshen and Lindsay are operated at 60 cycles while the balance of the system, except as noted, is 50 cycles. As stated in defendant's answer to Interrogatory 16-c, the San Joaquin Valley system is normally mechanically attached to the balance of the system through the shafts of frequency changer sets. When not so attached, the Valley system is supplied by an isolated 220,000 volt line supplied by Big Creek generators which are temporarily operated at 60 cycles. Hanford substation is completely isolated from other Company facilities.

16-i. Answer to Interrogatory No. 16-i—

Defendant interprets the question as seeking information as to whether there is any method of determining by

day and by week the total power generated in California and the total power received from without the state. If this interpretation of the question is correct, the answer is yes.

16-j. Answer to Interrogatory No. 16-j—

Under the condition of ordinary breakdown in the Company's transmission and generating equipment, either in or out of California, [63] automatic equipment isolates the breakdown without affecting the generation of power at any of the Company's generating sources, or its transmission therefrom. If major trouble develops which isolates a major generating station, automatic equipment will cause the other generating sources of the Company to assume the power generated by the generating source which was isolated by breakdown.

16-k. Answer to Interrogatory No. 16-k—

No. Insofar as the major sources of generation by the Company are concerned, it is possible for electric power to go to any load on the system provided it is not backed off by power generated at one of the other generating sources. However, since the minor generating plants of Kaweah, Tule, Kern River, Santa Ana River, Mill Creek, Lytle Creek, San Antonio Creek and Vernon Diesel are of such small capacity, the power generated by these plants is not transmitted out of its local area. The Hanford substation is completely isolated from all sources of generation by the Company's generating plants and is served by power purchased from another utility. Except for Hanford substation, the power which is generated by the three principal sources heretofore named, to-wit: Big Creek, Boulder Dam and Long Beach Steam Plant, may go anywhere in the system except as noted in defendant's answer to Interrogatory No. 16-c.

16-l. Answer to Interrogatory No. 16-l—

The electricity generated at the Company's three principal sources, to-wit: Big Creek, Boulder and Long Beach Steam Plant, are carried on separate 220,000 volt lines which are separate and apart until they meet at Laguna-Bell station. However, as set out in the defendant's answers to preceding interrogatories, the defendant's system is so set up that electrical energy from any one of the three sources may be transmitted to any one of its ten principal distributing substations so that energy may be and often is supplied wholly [64] from one of the three sources to any one of the said ten distributing stations.

16-m. Answer to Interrogatory No. 16-m—

The Company objects to answering the question on the ground it is so indefinite and ambiguous that it is unable to ascertain exactly what is intended to be elicited by the question. The Company believes the information sought to be elicited has been covered by answers to other questions.

17. Answer to Interrogatory No. 17—

Dispatcher Bulletins, Departmental Letter Book, Station Instructions, Accident Prevention Rule Book and Fire Prevention Manual.

18. Answer to Interrogatory No. 18—

The interrogatory can be answered only with reference to current files for the reason that when a dispatcher's bulletin is changed or corrected, the bulletin as originally drawn is not preserved nor a record kept of it. The present file shows that dispatcher's bulletins are on file at all stations as follows:

Emergency Orders—Your Station

Emergency Orders—Adjacent Stations

Switching Center Jurisdiction for all lines and equipment—Your Station

Also, Bulletins Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 21, 25, 26, 102, 105, 111 and 120.

Bulletins Nos. 10, 12, 14, 15, 16, 17, 22, 23, 24, 52, 54, 55, 56, 65, 68, 108, 164, 410 and 511, are not applicable to all stations but are on file at some of the stations.

19. Answer to Interrogatory No. 19—

Defendant objects to answering Interrogatory No. 19 upon [65] the ground that it would require an unreasonable expenditure of time and money upon its part. Defendant estimates that there are 65 substations at which the plaintiffs and plaintiff-interveners may have worked in the period in question. In each substation, a daily log is kept, and to comply with Interrogatory No. 19 it is estimated would take a minimum of 1548 manhours at a minimum cost to defendant of between \$2,000 and \$3,000. This objection is made on the ground stated, and is supported by the affidavit of William M. King, attached hereto. That compliance with the said Interrogatory would require about 1,000 large sheets, approximately 11 by 16 inches, and in affiant's opinion would be so voluminous as to be of little, if any, assistance to either court or counsel.

20. Answer to Interrogatory No. 20—

The Company has not by bulletin, general order, or otherwise, defined any duty of any of its employees as "active duty" or "inactive duty." The terms were employed by the defendant in its answer merely as terms of designation.

(a) The term "active service" was employed by the defendant in its answer to designate those services which each of the said plaintiffs and plaintiff-interveners were employed to perform, the nature or general summary of which is set out in answers 3 (a), 3 (b) and 3 (c).

(b) The term "inactive service" was employed by the defendant in its answer to designate the time in which the said plaintiffs and plaintiff-interveners were performing no service for the defendant, other than being available for service in the manner and to the extent shown in the preceding answers, if and when called upon to perform any active service. [66]

State of California

County of Los Angeles—ss.

R. E. Fife, being first duly sworn, deposes and says:

That he is a citizen and resident of the County of Los Angeles, State of California; that he is the Comptroller of the defendant company and has been such since the 1st day of August, 1945, and prior to that was Executive Assistant to the Vice-President to whom the Comptroller reports; that he is now the Chief Accounting Officer for the defendant, and, as such, has read the answer of the defendant to Interrogatory No. 2 and verifies the same for the defendant; that the said schedules referred to in said answer and filed herewith have been prepared under affiant's direction; that the said facts stated in the said answer and schedules are as shown by the Company's books and records, and are true according to affiant's best knowledge, information and belief.

Further deponent saith not.

R. E. FIFE

Subscribed and sworn to before me this 4th day of December, 1945.

(Seal)

O. W. SCOTT

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires October 6, 1947. [67]

State of California

County of Los Angeles—ss.

E. N. Husher, being first duly sworn, deposes and says:

That he is a citizen and resident of the County of Los Angeles, State of California; that he was employed by defendant in the above entitled action as Superintendent of Distribution from November 1, 1938, to December 31, 1941, as Superintendent of the Alhambra District from January 1, 1941, to May 31, 1941, as Assistant Superintendent of Distribution from June 1, 1941, to January 24, 1945, and as Superintendent of Distribution from January 25, 1945, up to the present time; that he has read the Answers of defendant and verifies Answers to 1 (c), 3 (c), 7 (c), 8 (c), 15 (c) and 20 insofar as 20 applies to plaintiffs and plaintiff-interveners classified as Primary Servicemen, and the objection to interrogatory 16 (e), for the reason that Primary Servicemen were and are under the Distribution Division; and that the facts stated in the above-numbered answers which he verifies for the said company and in the objection to interrogatory 16 (e), are true to his best knowledge, information and belief.

Further deponent saith not.

E. N. HUSHER

Subscribed and sworn to before me this 4th day of December, 1945.

(Seal)

O. W. SCOTT

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires October 6, 1947. [68]

State of California

County of Los Angeles—ss.

William M. King, being first duly sworn, deposes and says:

That he is a citizen and resident of the County of Los Angeles, State of California, and employed by defendant Southern California Edison Company as Superintendent's Office Assistant, Substation Division, Operating Department; that he has read the objections stated to Interrogatory No. 19 and that the same are true to his best knowledge, information and belief; that affiant states that in August or September, 1945, he had conferences with Mr. Moran, Superintendent of Substations, and counsel for defendant as to the feasibility of making digests of all of the logs in the various substations involved in this litigation and that a man, whose name escapes affiant but who was stated to be an economist by counsel for plaintiffs, went over the log books with affiant and affiant discussed with said economist and also with Mr. Sokol, counsel for plaintiffs, the form of said digest; that for the purpose of determining the feasibility of making such digest, affiant has had one experienced man, to-wit: Robert H. Lyon, working under him and examining the log books of about ten substations; that said Lyon has thus far worked an entire month, forty hours per week, and has completed something less than one-tenth of the compilations that would be necessary to comply with Interrogatory No. 19; that based on the actual work involved, exclusive of the time necessary for affiant to give to supervising and directing such work, it would take approximately 1548 man-hours of persons experienced and capable of doing that character of work; that the salary being paid said Lyon at the present time is \$225.00 per month; that affiant esti-

mates that the actual cost of that work, exclusive of the time affiant would have to give to supervise the work, would be approximately \$2,000.00 and [69] it would require another \$500 to \$1,000 for necessary copying or photostating; that this does not include any estimate for the time of affiant in supervising and checking and ascertaining that the compilations are correct; that these estimates are based upon the work that is being carried on at this time, and are made on the assumption that the work will be carried on by one, or not to exceed two men. If a sufficient number of experienced men were put on the work to complete it within a month or so, theoretically the cost would not be increased. Practically, it would, because there are not available the men with experience to do it, and considerable time would have to be taken to break them in, supervise and train them. The compilations so far made indicate to affiant that there is such a similarity between all logs that a few digests of logs can be used as fair samples of all of them; that all logs run about the same so far as the actual facts recorded are concerned, and the principal variation seems to be in the manner of expression by the various persons making the entries. There is some slight variation between logs of two-men and one-man stations, but the logs of two-men stations are substantially similar, and there is not a great deal of difference between the compilation of the logs of the one and two-men stations.

Further, deponent saith not.

WILLIAM M. KING

Subscribed and sworn to before me this 29th day of November, 1945.

(Seal)

MARY S. ALEXANDER

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires July 9, 1948. [70]

State of California

County of Los Angeles—ss.

H. A. Lott, being first duly sworn, deposes and says:

That he is an electrical engineer by profession and has been such since approximately 1921. That he is employed by the defendant company as Operating Engineer, and has been so employed for approximately eight years.

That affiant has read the foregoing answers to interrogatories, and verifies the facts stated in the objections to answer of Interrogatories 16 (a) and 16 (b), and the answers to Interrogatories 16 (c), 16 (d), 16 (g), 16 (h), 16 (i), 16 (j), 16 (k) and 16 (l), and the answer to 16 (f), except that the fact implied in said answer that F. E. Griffes was Headworks Tender at Kaweah No. 1 Hydro Plant was hearsay from G. R. Woodman.

That the facts stated in the answers above numbered which he verifies and the facts stated in the objections to Interrogatories 16 (a) and 16 (b) are true to affiant's best knowledge, information and belief.

That affiant, as an electrical engineer, is unable to ascertain precisely what is meant by Interrogatory No. 16 (m), but believes that it is answered by the preceding answers to interrogatories.

Further deponent saith not.

H. A. LOTT

Subscribed and sworn to before me this 4th day of December, 1945.

(Seal)

O. W. SCOTT

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires October 6, 1947. [71]

State of California

County of Los Angeles—ss.

G. E. Moran; being first duly sworn; deposes and says:

That he is a citizen and resident of the County of Los Angeles, State of California; that he is employed by defendant in the above entitled action as Superintendent of Substations; that he has been such superintendent since January 25, 1945, and prior thereto was Assistant Superintendent of said Substations from January 1, 1941 to January 25, 1945; that he has read the answers of defendant and verifies answers to Interrogatories Nos. 1 (a), 3 (a), 4 (a), 5 (a), 6 (a), 15 (a), 17 (a) and 18 for the reason that they appertain to plaintiffs and plaintiff-interferers classed as substation operators and attendants, and further verifies defendant's answer to Interrogatory No. 20 insofar as it applies to said plaintiffs and plaintiff-interferers classed as substation operators and attendants; that the facts stated in said answers are true according to his best knowledge, information and belief.

Further deponent saith not.

G. E. MORAN

Subscribed and sworn to before me this 4th day of December, 1945:

(Seal)

O. W. SCOTT

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires October 6, 1947. [72]

State of California

County of Los Angeles—ss.

G. R. Woodman, being first duly sworn, deposes and says:

That he is a citizen and resident of the County of Los Angeles, State of California; that he is employed by the

defendant in the above entitled action as Superintendent of Hydro-Generation and has been such for approximately two years; that he has been in the Hydro Division approximately seventeen years; that he has read the answers of defendant and verifies answers to Interrogatories Nos. 1 (b), 3 (b), 4 (b), 5 (b), 6 (b), 9 (b), 10 (b), 11 (b), 12 (b), 13 (b), 14 (b) and 15 (b), by reason of the fact that said answers appertain to the Hydro Station Attendants and Headworks Tenders, all of whom work in the Hydro Division; that he verifies the answer to Interrogatory No. 20 insofar as it appertains to plaintiffs and plaintiff-intervenors classified as Hydro Station Attendants and Headworks Tenders; that affiant further verifies a portion of the answer to Interrogatory No. 16 (f), which states that F. E. Griffes was Headworks Tender at the Company's No. 1 Hydro Plant; that the facts stated in said answers are true according to his best knowledge, information and belief.

Further deponent saith not.

G. R. WOODMAN

Subscribed and sworn to before me this 4th day of December, 1945.

(Seal)

O. W. SCOTT

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires October 6, 1947. [73]

* * * * *

Received copy of the within Answer and Objections to Plaintiffs' Interrogatories this.....day of..... 1945. David Sokol, Attorney for Plaintiffs and Plaintiff-Intervenors.

[Endorsed]: Filed Dec. 5, 1945. Edmund L. Smith, Clerk. [134]

[Title of District Court and Cause]

STIPULATION REQUIRED BY PARAGRAPH (3)
OF ORDER FOR PRETRIAL HEARING

Come now the parties by their respective counsel and, pursuant to Paragraph (3) of the Order for Pretrial Hearing, file the following stipulation:

I.

- (a) A concise statement of the facts involved, as claimed by each party, showing which facts will be admitted by all or any of the parties for the purposes of the suit and which facts each party intends to litigate upon the trial.

The action is by plaintiffs and interveners, hereafter, unless otherwise noted, all referred to as plaintiffs, to recover for overtime compensation and liquidated damages which are alleged severally [135] by the plaintiffs. The answer of the defendant denies that any of the plaintiffs are under the Fair Labor Standards Act (hereinafter referred to for brevity as the "Act" or "statute"), and denies that any of them have performed overtime services for which they have not been fully compensated.

Counsel have filed pretrial briefs and have held numerous conferences. The issues presented by the pleadings as above outlined present numerous questions of law and of fact. The position of the respective parties with reference to these is concisely as follows:

1. (a) Plaintiffs claim that the importation into California and the distribution of power generated by the defendant at Boulder, Arizona (hereafter referred to as "Boulder power"), places defendant in commerce and

brings all of the plaintiffs under the Act. Defendant denies that the distribution of Boulder power is an act in interstate commerce or places any employee of the defendant whose work is necessary to such distribution under the Act. It concedes that if the Court holds that the distribution of Boulder power is an act in interstate commerce that then, all of the plaintiffs who are primary servicemen or substation operators and attendants, other than those in the San Joaquin Valley, would be under the Act.

(b) Defendant takes the position that no Boulder power reaches the San Joaquin Valley, but when Boulder power flows toward San Joaquin, it operates a frequency changer, that is to say, it operates a motor which, in turn, operates a generator, which generates electrical energy at sixty cycles, Boulder and other electrical energy of defendant being principally distributed through Southern California at fifty cycles. Contrary to plaintiffs, defendant contends that the electrical energy flowing from the frequency changer is not to be considered as Boulder power.

2. (a) Plaintiffs contend that the distribution of electrical energy by the defendant to concerns in commerce places the employees necessary to such distribution under the Act. Defendant denies this [136] and claims that the distribution of electrical energy to concerns in commerce, or using it for commerce, does not place the employees of defendant necessary to such distribution in commerce.

(b) The defendant concedes that if the Court holds otherwise, that all of the plaintiff primary servicemen and substation operators and attendants would be under the Act who could show power was distributed over the

lines they serviced or through the substations at which they were stationed to concerns using it for commerce. Also, that all of the plaintiffs in the Hydro Division would be under the Act who could show that the electrical energy, to the generation of which they work contributed, was distributed to concerns using the same in interstate commerce. In this connection, defendant contends that the electrical energy generated at its Kaweah generating plants ordinarily does not flow out of the San Joaquin Valley. Defendant concedes that any of the plaintiff hydro employees who were connected with its Big Creek plant would be under the Act if the Court holds that the distribution of electrical energy to concerns using it for commerce places employees necessary to such distribution under the Act.

3. (a) Plaintiffs claim that the distribution of electrical energy to concerns using the same for the production of goods for commerce, hereafter for brevity referred to as the "production of goods," places the employees necessary to such distribution under the Act. Defendant denies this, and contends that such employees of defendant are too far removed from the production of goods or work necessary for production, to bring them under the Act.

(b) If the Court holds to the contrary, defendant makes precisely the same concessions with reference to the plaintiffs who would be under the Act as made above with reference to the distribution of electrical energy for use in commerce, except that the distribution to be shown would be for the production of goods.

4. Defendant, in preparing its pretrial brief and agreeing to [137] this statement, has excluded from its consideration the interveners named in the stipulation filed sub-

sequent to the filing of defendant's pretrial brief. It reserves the right to plead that some of the interveners included in such stipulation fall within the exemptions to the Act, as executives.

5. Applicable Statute of Limitations

The pleadings present an issue as to the applicable statute of limitations. Defendant does not claim the action is barred, but pleads the various sections of the Code of Civil Procedure with reference to the limitation of actions as limiting the time within which recovery can be allowed if the Court finds any of the plaintiffs are entitled to recover. The pleas present the following questions:

- (1) Is the allowance of liquidated damages governed by Section 340 of the Code of Civil Procedure?
- (2) Is the recovery of overtime compensation, if any, and liquidated damages (if the Court holds that liquidated damages are not governed by Section 340 C. C. P.) governed by Section 338 or Section 339 of the Code of Civil Procedure?

(3) Constitutional questions involved

(a) Defendant, by its answer, challenges the constitutionality of the Act in so far as prescribing liquidated damages is concerned, as taking defendant's property without due process of law.

In its trial brief, defendant states that it calls the attention of the Court to this issue, but does not discuss it further than to advise the Court that it does not waive it.

(b) Defendant does contend that in any and all events, no sums can be awarded either for overtime or liquidated damages for the sixth day during which the

respective plaintiffs were required to work under governmental order during the period of critical labor shortage, as decreed by the War Manpower Commission, and contends that for the reasons stated in its pretrial brief, to award either overtime or [138] liquidated damages for such sixth day would be the taking of its property without due process of law.

- (4) Issues of fact in the event the Court holds that any of the plaintiffs are under the Act

Generally speaking, the plaintiffs are subdivided into three classes:

- (a) Substation operators and attendants.
- (b) Primary servicemen.
- (c) Employees in the Hydro Division, referred to as Hydro employees.
- (a) Substation operators and attendants:

It is the contention of the plaintiffs that these employees were required as a condition of employment to live upon defendant's property and not leave for twenty-four hours a day for five days a week, except during the time that Southern California was declared by the War Manpower Commission to be a critical labor shortage area (hereafter for brevity referred to as "critical labor shortage"), when they were required to remain on the premises for twenty-four hours a day for six days a week. Each of said plaintiffs was paid a monthly salary. Plaintiffs contend that the salary paid them was for eight hours per day, forty hours per week, each work week during the month and that the time worked in excess thereof, under the Act, must be compensated for at time and half plus an equal amount as liquidated damages.

Defendant contends:

1—That while they had no regularly scheduled hours, the active services did not consume more than two to five hours per day; that the normal active and inactive services were the equivalent of a job of eight hours of active service and that the parties impliedly agreed so to regard the employment; that there is, therefore, nothing due to any of said plaintiffs.

2—That the monthly salary paid to plaintiffs covered all [139] services performed, active or inactive, whether denominated waiting or standby time, or otherwise, except emergency callouts during nighttime hours for which overtime was paid, so that if the Court finds there is any overtime due to any of said plaintiffs, it can allow them only half of the basic hourly rate as determined by the Court, plus an equal amount for liquidated damages.

(b) Hydro Employees

Employees of the Hydro Division perform a different character of work than substation operators and attendants, but the respective parties make substantially the same claims as set out with reference to the substation operators and attendants, except defendant claims the requirements as to the employees remaining upon the Company's property were somewhat different.

(c) Primary Servicemen

Plaintiff contends that the primary servicemen were employed on a monthly salary for eight hours per day, five days per week, forty hours in each work week during the month, except during the critical labor shortage when six days were required. The primary servicemen contend

that as a condition of employment they were required after the end of their regular eight-hour shift to remain on call waiting for trouble or other messages from their supervisors and the switching centers, during which time they were required to remain at home; that in addition, in certain instances, the company maintained the regular company telephone at the primary servicemen's home, which telephone was listed in the telephone directory as that of the defendant and such plaintiff primary servicemen were required to answer the said telephone after their regular work day. Plaintiff primary servicemen contend that the time so spent at the direction of the company after the regular work day was work time and that they are entitled to be compensated therefor under the Act.

Defendant contends that each of the primary servicemen were employed on a monthly salary for eight hours per day for five days [140] per week except during the critical labor shortage when it was six. At the end of his eight hour shift he was free to do whatever he pleased and go wherever he pleased, the only requirement being that if he left his residence, he advise the substation or switching center where he could be reached by telephone in case of an emergency requiring his service. Defendant contends that this did not constitute any employment restraint or entitle any of the said primary servicemen to have any of the time after their eight hour shift regarded as waiting or standby time. The same issues and contentions are made as to salary covering all services whether active or inactive that exist between the parties with reference to the other two classes of employees.

II.

- (b) List of all documents exhibited by each party at the meeting or meetings held pursuant to (2) above, with a description of each document sufficient for identification and a statement of all admissions by and all issues between any of the parties as to the genuineness thereof, as to due execution thereof, and as to the truth of relevant matters of fact set forth therein.

Thus far, plaintiffs have exhibited no documents to the defendant. Defendant, however, has exhibited to counsel for plaintiffs:

(1) The log-books of the substations involved, and has offered and advised counsel that he could examine any of said log-books at any convenient time and place desired.

(2) The log-books of the hydro employee plaintiffs.

(3) Time sheets of the hydro employees and primary servicemen plaintiffs. [141]

(4) Recapitulation, thirteen in number, of certain substation log-books and has furnished copies thereof to counsel for plaintiffs. Plaintiff has requested recapitulations of additional logs of the plaintiffs, and defendant proposes between now and the time of trial to make additional recapitulations of other logs.

(5) The time-cards and timesheet reports of each of the substation operators and attendants and a sample of summary which defendant proposes to make and introduce at the trial of each and all of said records which defendant claims will show the number of times each of said plaintiffs was called out to perform any emergency services during the period denominated in defendant's answer as "nighttime hours."

(6) In addition thereto, defendant has exhibited to and delivered a copy to counsel for plaintiffs of a booklet containing certain bulletins and operating orders comprising:

- 1—Operating Order No. 1, as revised January 1, 1942.
- 2—Same Order, as revised January 1, 1943.
- 3—Operating Order No. 2, as revised May 1, 1941.
- 4—Same Order as revised May 1, 1943.
- 5—Substation Order A-36, as revised January 1, 1942.
- 6—Same Order as revised January 1, 1943.
- 7—Letter of B. M. Cavner, Superintendent of Substations, dated April 17, 1943, with reference to said Order A-36.
- 8—Hydro Generating Order No. 22 as revised January 1, 1942.
- 9—Same Order as revised January 1, 1943.

Counsel for the respective parties have agreed, subject to the approval of the court, to reserve the right prior to the trial of exhibiting to counsel for the other party any other document, bulletin, order, or other character of writing, which further study of the case indicates to counsel may be desirable to be introduced at the trial.

Defendant has advised counsel for plaintiffs that it in- [142] tends to make a summary of all of the time records of the substation operators and attendants similar to the one exhibited to counsel for plaintiffs, and to introduce the same at the trial. Counsel for defendant have also advised counsel for the plaintiffs that defendant intends to make a similar summary of the time records of the hydro employee plaintiffs and also the primary servicemen, if it is able to do so before the time of trial and

deliver copies thereof to plaintiffs' counsel and to introduce the same at the trial.

The statement of the respective parties has been made with reference to the plaintiffs and interveners who were parties to the action prior to the filing of the pretrial briefs of the respective parties. Subsequent to the filing of defendant's pretrial brief, a stipulation has been filed adding additional interveners. Counsel for defendant have advised counsel for plaintiffs that they may take the position as to at least one of said interveners, that he is under the express exemptions of the Act, but at present defendants have not sufficient information thereon to take a definite position.

(7) An estimate of the length of time of trial is extremely difficult, but the best estimate which counsel for the parties can make after discussion is that the trial will take from one to three weeks.

Dated: Los Angeles, California, April 29, 1946.

DAVID SOKOL

Attorney for Plaintiffs and Intervenors

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd.

[Endorsed]: Filed Apr. 30, 1946. Edmund L. Smith,
Clerk. [143]

[Title of District Court and Cause]

STIPULATION

The following facts are hereby stipulated to by and between the respective parties, through their respective attorneys:

1. The defendant does not furnish any electrical energy to any person, firm, or corporation operating within the city limits of Los Angeles other than the Los Angeles Transit Lines and the Pacific Electric Railway Company, electrical energy to all other concerns using such energy within the said city limits being furnished by the Department of Water and Power of the City of Los Angeles. Electrical energy is both bought from and sold to the Department of Water and Power of the City of Los Angeles by the defendant. [144]

2. Also, the defendant does not furnish electrical energy to any person, firm, or corporation operating within the city limits of the cities of Burbank, Glendale or Pasadena, except to the Pacific Electric Railway Company.

3. Outside of the cities of Los Angeles, Burbank, Glendale and Pasadena, the defendant has, during the period since March 22, 1942, to date, supplied electrical energy within Southern California to the following types of consumers:

- (1) Western Union Telegraph Company.
- (2) Various telephone exchanges.
- (3) Radio stations.
- (4) The Atchison, Topeka, & Santa Fe Railway Company.
- (5) Union Pacific Railroad Company.

- (6) Southern Pacific Company.
- (7) Los Angeles Transit Lines and Pacific Electric Railway Company.
- (8) Airports.
- (9) Newspapers (but not any of the newspapers published in the City of Los Angeles).
- (10) Depots for bus lines.
- (11) Army and Navy camps.
- (12) Governmental agencies.
- (13) Municipalities.
- (14) Various oil companies.
- (15) Various motion picture companies.
- (16) Fruit packing plants.
- (17) Industrial concerns of various types.

4. The railroads use the electrical energy which defendant has furnished them for lighting their stations, for operating machine shops, and to light and operate various signal devices. The parties are not advised and do not stipulate as to whether the railroads, except for lighting their stations and machine shops, use the current [145] directly which they receive from the defendant for any of the purposes above stipulated, or whether the voltage or frequency is changed or whether the electrical energy received from the defendant by the railroads is used to operate motors or other equipment that generate current which is used for the purposes above stipulated. All of the defendant's electrical energy is furnished to its customers in an alternating current. The Los Angeles Transit Lines and Pacific Electric Railway Company, in addition to the above, uses stipulated to, use the electrical energy furnished them in an alternating current by various methods to operate equipment which produces a direct

current which is used by said companies to operate their cars and trains.

5. Army and navy camps use the electrical energy to light the camps and other miscellaneous uses connected with housing personnel.

6. The Western Union and Telephone Exchanges use the electrical energy for general office use and also transform the electrical energy furnished it and after transforming the same use the current for the transmission of messages, and also for the charging of storage batteries also used for the said purpose.

7. At the time of entering into this stipulation, the defendant is not advised that any of the commercial airports to which it furnishes electrical energy are used by planes making interstate flights, but it is stipulated that the defendant furnishes electrical energy for lighting some emergency airfields that may be used by any type of plane, and also furnishes electrical energy to army, navy, and marine airfields, the planes of which frequently fly across state lines.

8. The radio broadcasting stations use the electrical energy furnished by defendant for general office purposes, but do not directly use the electrical energy furnished said stations for broadcasting, but use it for the operation of motors which, in turn, generate electrical energy which, after passing through several different [146] electrical tubes and other devices, is used for the purpose of broadcasting.

9. Defendant also furnishes to the United States Government electrical energy to operate a chain of beacon signals for airplanes, some of which guide planes engaged in intrastate and interstate flights.

10. The newspapers use the electrical energy furnished by defendant for general office purposes, and to operate their presses either as received from the defendant directly, or to operate motors or transformers which generate energy at different current voltage or frequency which, in turn, operate the presses, but defendant does stipulate they use it in one or the other method.

11. The oil companies use the electrical energy furnished them for lighting their stations or refineries, and some use it in the field for drilling and operating oil wells.

12. Motion picture studios use the electrical energy furnished them for general lighting, which includes set lighting, but for the taking of pictures they use the electrical energy furnished by defendant to operate conversion equipment, which produces current that is used in operating cameras and sound tracks.

13. The fruit packing plants use the electrical energy which the defendant furnishes them for lighting their plants, for operating machinery and equipment, and for the packing and processing of fruits and agricultural products sold in intra and interstate commerce. The parties do not stipulate as to whether the said electrical energy used by any packing plant or establishment for the operation of machinery and equipment is used directly for the operation thereof, or for the operation of conversion equipment, or transformers. The parties stipulate that some of the fruit packing plants herein mentioned are cooperatives. Defendant will not stipulate that any of them are not cooperatives. Plaintiffs will not stipulate that all of them are cooperatives. [147]

14. In addition to the foregoing, the defendant supplies power to numerous industrial concerns in Southern Cali-

fornia which use such power for the lighting of their establishments and for the operation of machinery and equipment used in the manufacturing and processing of goods, but the parties do not stipulate as to the manner in which any one industrial concern operates its machinery or equipment, that is to say, some of the concerns use the electrical energy furnished them by defendant directly in the production and processing of goods; others use it either for operating transformers or conversion equipment, using the electricity produced by the transformers or conversion equipment for the production and processing of goods.

15. The parties further stipulate that the foregoing stipulation shall not limit the parties in introducing upon the trial hereof further and additional evidence respecting the matters herein set forth, or in explanation of any of the terms herein employed.

Dated: Los Angeles, California, May 2nd 1946.

DAVID SOKOL

Attorney for Plaintiffs and Interveners

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd.

[Endorsed]: Filed May 3, 1946. Edmund L. Smith,
Clerk. [148]

[Title of District Court and Cause]

REQUEST FOR ADMISSION OF FACTS UNDER
RULE 36 OF THE FEDERAL RULES OF
CIVIL PROCEDURE

To the Defendant and Its Counsel:

Please Take Notice that pursuant to Rule 36 of the Federal Rules of Civil Procedure, you are requested to admit, within 15 days after service upon you of this demand, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the following:

1. That the plaintiffs and intervenors in the above entitled action were at all times engaged in work and processes necessary to the production of goods in interstate commerce.

2. That the plaintiffs and intervenors were at all times engaged in work necessary to the transmission of electric power and energy in interstate commerce.

3. That plaintiffs and intervenors substation relief operators were required by defendant to relieve substation operators on days off, vacations and in emergencies. [149]

4. That the plaintiffs and intervenors substation relief operators were required by defendant to live at the substation where they were relieving, and remain on duty for 24 hours each day while relieving substation operators.

5. That plaintiffs and intervenors substation relief operators lived in special relief quarters furnished by the defendant.

6. That the plaintiffs and intervenors were required by the defendant to record on weekly time sheets only 8 hours per day normal working time.

7. That the plaintiffs and intervenors were permitted to enter on their weekly time sheets additional time worked only in emergencies.

8. That the plaintiffs and intervenors were not compensated for time worked except for the time actually recorded on the weekly time sheet.

Dated, Los Angeles, May 15, 1947.

DAVID SOKOL

Attorney for Plaintiffs and Intervenors.

[Affidavit of service by mail.]

[Endorsed]: Filed May 16, 1947. Edmund L. Smith, Clerk. [151]

[Title of District Court and Cause]

MOTION TO DISMISS and POINTS AND AUTHORITIES IN SUPPORT THEREOF

Comes now the defendant, Southern California Edison Company, Ltd., and with leave of Court first had and obtained, because of the enactment of the Portal to Portal Act of 1947 subsequent to the joining of issue in the above-entitled matter, moves this Court to dismiss the above-entitled action, upon the grounds:

One. That this Court has now no jurisdiction of the subject matter of the action and has not had jurisdiction of the subject matter of the action since the effective date of the said Portal to Portal Act of 1947;

Two. That the second amended complaint fails to state a claim upon which relief can be granted and has failed to state such a claim since the effective date of the said [152] Portal-to-Portal Act of 1947.

Said motion will be made upon all the files and papers in said cause and upon the Points and Authorities filed in support of said motion, copy of which is attached and served herewith.

Dated, Los Angeles, California, June 26, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry,

Attorneys for Defendant, Southern California
Edison Company, Ltd.

[Endorsed]: Filed Jun. 26, 1947. Edmund L. Smith,
Clerk. [153]

[Title of District Court and Cause]

NOTICE OF HEARING ON DEFENDANT'S
MOTION TO DISMISS

To the Plaintiffs in the action above entitled, and to
David Sokol, Esq., their attorney:

You, and Each of You, Will Please Take Notice that
the undersigned attorneys for the defendant, Southern
California Edison Company, Ltd., will bring on for hear-
ing said defendant's Motion to Dismiss, dated June 26th,
1947, and served and filed herewith, before the Honorable
William C. Mathes in his Courtroom in the Federal Post
Office and Court House Building in the City of Los An-
geles, State of California, on Friday, the 11th day of
July, 1947, at the hour of 10:00 o'clock A.M., on said
date, [154] or as soon thereafter as counsel can be heard.

Dated: Los Angeles, California, June 26th, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd.

Received copy of the within Motion to Dismiss with
Points and Authorities in support thereof, and Notice of
Hearing of Motion, this 26th day of June, 1947. David
Sokol, Attorney for Plaintiffs.

[Endorsed]: Filed Jun. 26, 1947. Edmund L. Smith,
Clerk. [156]

[Title of District Court and Cause]

DEFENDANT'S RESPONSE TO REQUEST FOR
ADMISSION OF FACTS UNDER RULE 36 OF
THE RULES OF CIVIL PROCEDURE

The plaintiffs having duly served upon the defendant under Rule 36 of the Federal Rules of Civil Procedure, Request for Admission of Facts, and the defendant having subsequent thereto filed a Motion to Dismiss the cause upon the ground that the Court now has no jurisdiction of the subject matter of the action, and has not had jurisdiction thereof since the effective date of the Portal-to-Portal Act of 1947, and that the Second Amended Complaint does not state a claim upon which relief can be granted and has not stated such claim since the effective date of said Portal-to-Portal [157] Act, and said Motion being set for hearing on the 11th day of July, 1947, and the time within which the defendant is required to respond to said Request, in the event the Court should deny said Motion, expiring on the 1st day of July, 1947, and the defendant in the event,—which it does not anticipate,—of the Court denying its said Motion to Dismiss, not desiring to admit any Request for Admission except as hereinafter stated in the responses thereto, files this, its Responses to the said several Requests for Admission. In doing so, defendant does not waive, but insists upon its Motion to Dismiss upon each and both of said grounds.

I.

Defendant's Response to the First Requested Admission of Fact:

Defendant cannot admit or deny categorically the requested admission, for the reasons that it embraces conclusions of law and factual information as to the activities of consumers which the defendant does not now have.

Defendant admits that all of the plaintiffs and intervenors at all times involved in the litigation were engaged in work necessary for the distribution of its electrical energy to its customers. Defendant further admits that some of its customers were engaged in the production of goods for interstate commerce, and that some of such customers used the electricity furnished in the production of such goods.

II.

Defendant's Response to the Second Requested Admission of Fact:

Defendant denies the requested admission. In this connection, the defendant admits that electrical energy is transmitted to it from Nevada and that such energy is "stepped down" in voltage at its major transmission substations, and after its voltage has [158] been stepped down or altered, it is mingled with its electrical energy obtained from other sources within the State of California and distributed to defendant's customers throughout California. Defendant denies that any of the plaintiffs or intervenors were employed at any of such major transmission substations or in the maintenance or operation of any transmission lines from Nevada thereto.

III.

Defendant's Response to the Third Requested Admission of Fact:

Defendant admits that plaintiffs and intervenors, substation relief operators, were employed by the defendant to relieve substation operators on days off, vacations, and during certain other periods when the substation operator was absent from the job because of sickness or other personal reasons. The defendant cannot ascertain from the form of the requested admission whether anything

further than this is contained or implied in the requested admission. If it is, the defendant denies any such further fact or implication.

IV.

Defendant's Response to the Fourth Requested Admission of Fact:

(1) Defendant denies that such relief operators were required to live at the substation, and admits that when relieving a substation operator and attendant the relief operator was required to live in the quarters furnished him by defendant and to remain on or adjacent to the defendant's property during the entire relief period.

(2) Defendant denies that the relief operator was on duty for twenty-four hours a day, and alleges that he would not be on [159] duty except in cases of emergency for more than two to five hours per day.

V.

Defendant's Response to the Fifth Requested Admission of Fact:

Defendant admits the facts requested to be admitted in the fifth requested admission.

VI.

Defendant's Response to the Sixth Requested Admission of Fact:

Defendant denies the facts requested to be admitted by the sixth request for admission.

In this connection, the defendant states:

(1) That the plaintiffs and intervenors who were primary service men worked on an eight-hour shift for five days a week except during the period of time which is set out in the Answer when they were required to work six

days a week because Southern California was on a 48-hour work week; that the said primary service men were required and expected to record any and all time which they worked, and that they were paid not less than time and a half for any and all services performed by them in excess of 40 hours per week, which included the sixth day that they worked an eight-hour shift.

(2) That the said plaintiffs and intervenors who were substation operators and attendants made out their own time cards, as alleged in defendant's Answer. That any active duties or services required of them could be performed in from two to five hours a day, and except for certain designated times for calling their switching center and making inspections of the substation, they could perform their services at any time they saw fit, and when not [160] engaged in the active duties required of them, were free to engage in any activities they desired to and which could be performed on defendant's premises. That such plaintiffs and intervenors had no regularly scheduled hours of work; that under the system of payroll accounting applicable to such plaintiffs and intervenors, each made out his own time cards (daily and weekly) from which the monthly time cards of the Company were posted, that such time cards reflected as overtime all call-outs during the night-time hours, as set forth in defendant's answer, which were posted by such employees and for which they were paid at overtime rates of not less than time and a half. Exclusive of such overtime reflected on the time cards, the plaintiffs recorded eight hours for each day worked, notwithstanding the fact that they consumed from only two to five hours per day on the average in active duties during such days. This method of reporting was done with the consent of the defendant and is one of the facts relied on by the defendant in support of its contention that as

to such plaintiffs and intervenors as were substation operators and attendants, the defendant and plaintiffs and intervenors regarded their employment as the equivalent of a job of eight hours of active service.

(3) All of the foregoing facts with reference to the substation operators and attendants apply equally to the substation relief operators and to the plaintiffs in defendant's Hydro Division.

VII.

Defendant's Response to the Seventh Requested Admission of Fact:

Defendant denies the facts requested to be admitted in the seventh requested admission. [161]

VIII.

Defendant's Response to the Eighth Requested Admission of Fact:

In answer to the eighth requested admission, the defendant admits that the plaintiffs and intervenors were all paid and compensated for all time worked and for all overtime, as shown by the time cards prepared by the said plaintiffs and intervenors, and further admits that the method of payment and the method of recording time worked is as set forth in the defendant's answer to the Amended Complaint and as set forth in the defendant's answer to the sixth request for admission. The defendant denies that the plaintiffs and intervenors were not fully compensated for all time in fact worked by them. The defendant cannot ascertain from the form of the requested admission whether anything further is contained or im-

plied in the requested admission; if it is, the defendant denies any such further fact or implication.

Dated: Los Angeles, California, June 30, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd. [162]

[Verified.] [163]

Received copy of the within Responses to Request for Admission of Facts this 30th day of June 1947. David Sokol, by F. A. LaBelle, Attorney for Plaintiffs.

[Endorsed]: Filed Jun. 30, 1947. Edmund L. Smith, Clerk. [164]

[Title of District Court and Cause]

ORDER

The motion of the defendant to dismiss the above entitled action upon the grounds:

(1) That this court has now no jurisdiction of the subject matter of the action, and has not had jurisdiction of the subject matter of the action since the effective date of the Portal-to-Portal Act of 1947, and

(2) That the second amended complaint fails to state a claim upon which relief can be granted and has failed to state such claim since the effective date of the said Portal-to-Portal Act of 1947,

came on regularly to be heard before the Honorable William C. Mathes, Judge Presiding. [165]

Plaintiffs appeared by David Sokol, Esquire, their attorney, and the defendant by Norman S. Sterry, Esquire, and Rollin E. Woodbury, Esquire, its attorneys, and the said motion was duly argued and submitted to the court, and the court being fully advised in the premises, and it appearing that the second amended complaint does not now, and has not since the effective date of the Portal-to-Portal Act of 1947, set forth "a short and plain statement of the grounds upon which the court's jurisdiction depends" as required by Rule 8(a)(1) of the Federal Rules of Civil Procedure, and it further appearing that defendant may now, pursuant to Rule 12(g) of the Federal Rules of Civil Procedure, raise this question by motion to dismiss since the objection and defense was not available to defendant at the time of hearing of defendant's motion heretofore made and determined herein,

Now, Therefore, It Is Ordered:

(1) That defendant's motion to dismiss be and it is hereby granted with leave to plaintiffs to file a third amended complaint or an amendment to the second amended complaint on or before August 15, 1947, if so advised.

(2) At the request of plaintiffs' counsel, plaintiffs are given leave to file a motion for summary judgment, together with a memorandum of their points and authorities in support thereof and the statement required by local rule 3(d)(2), at any time on or before August 15, 1947.

(3) Counsel for plaintiffs having indicated that he expects to file a motion for summary judgment, and counsel for the defendant that they will probably file a motion with reference to any amended complaint, or any amendment to the second amended complaint, the court has

noted the above cause upon its calendar Monday, September 22, 1947, for the purpose of hearing motions which may be filed by either of the [166] parties, and directs that all motions addressed to the state of the pleadings, or for summary judgment, be noticed for hearing on September 22, 1947, at the hour of 10:00 A.M.

(4) That if, on or before August 15, 1947, the plaintiffs shall file an amended complaint or an amendment to the second amended complaint, or any motion for summary judgment, the defendant shall have until and including September 15, 1947, within which to file any motions addressed to the third amended complaint or any amendment to the second amended complaint, together with defendants reply by affidavits, pleading, or points and authorities, to any motion of plaintiffs for summary judgment.

(5) That plaintiffs shall have until and including September 20, 1947, within which to file any reply by way of counter-affidavits or points and authorities.

(6) It Is Further Ordered that the order setting this cause for trial on November 11, 1947, be and is hereby vacated, and the cause is now set for trial at 10:00 A.M. on February 3, 1948, with the cause with which it is now consolidated for trial, to wit, Raymond F. Drake, et al., plaintiffs, v. Southern California Edison Company, Ltd., a corporation, defendant, numbered in this court Civil No. 5544-WM.

Done in Open Court July 11, 1947.

WM. C. Mathes

United States District Judge

[Endorsed]: Filed Jul. 25, 1947. Edmund L. Smith,
Clerk. [167]

In the District Court of the United States for the
Southern District of California

Central Division

Civil Action No. 4327-WM

MYRON E. GLENN, HOWARD L. ANDERSEN,
ANDY G. AUSTIN, C. C. BLENIS, HAROLD
A. BOYNTON, W. B. BURTON, E. K. DICKER-
SON, FLOYD E. DOWNS, MERLE EDGER-
TON, EUGENE L. ELLINGFORD, C. R. FRA-
ZIER, LAWRENCE G. HAGERMAN, P. G.
HANLON, WILLIAM E. HOGG, OATHY G.
HORNE, W. S. HOSTETLER, L. F. HUDSON,
FRANK JOHNSON, PAUL L. LOWERY, VER-
NER NEHER, THOMAS E. OSBORNE, MAR-
ION S. POSTON, M. E. ROACH, G. W. STARK,
E. N. SWEITZER, ARCHIE TREGONING,
ROBERT C. GREEN, F. E. McCLANAHAN,
F. D. SCHWALBE, HARLAN E. MAYES,
ARTHUR E. FONTAINE, LAWRENCE E.
JACKSON, RICHARD W. RODENBECK, RU-
DOLPH C. GREINER, H. J. KREKELER, C. E.
FOSTER, J. A. HENLE, L. W. HENNIG, HER-
BERT S. KANEEN, EDWARD M. KIRSTE,
SIDNEY F. LAFOND, GEORGE F. LARSEN,
L. S. MORGAN, BENJAMIN E. MOSES, J. W.
McKERNAN, CHARLES S. MYRENIUS, AR-
THUR L. NEFF, JAMES C. SCHRADER,
HAROLD A. TRUNNELL, V. V. B. WERT, J. J.
BRYAN, E. G. EGGERS, F. E. GRIFFES, G. H.
BARTHOLOMEW, MERLE BARTHOLOMEW,
LOYD H. BELL, MONROE H. HUNTINGTON,
ROYE B. JOHNSON, FRED C. RAY, C.
ROGERS, GEORGE C. WOOLBRIDGE, PAUL

W. COCKRELL, J. D. BORDEN, JOHN M.
SMITH, W. H. CULBERTSON, A. L. HON-
NELL, L. A. PHINNEY, CLARENCE C.
PRINSLOW,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON CO., LTD.,
now known as SOUTHERN CALIFORNIA EDI-
SON COMPANY,

Defendants.

THIRD AMENDED COMPLAINT UNDER THE
FAIR LABOR STANDARDS ACT OF 1938
AND THE PORTAL-TO-PORTAL ACT OF
1947 [168]

First Cause of Action

Plaintiffs, by way of Third Amended Complaint, allege
as follows:

I.

Plaintiffs bring this action against defendant under and
by virtue of an Act of Congress of the United States of
America entitled, "The Fair Labor Standards Act of
1938" (Act of June 25, 1938, C. 678, 58 Stat. 1080;
U. S. C., Title 29, Section 201 et seq.), and the Portal-to-
Portal Act of 1947, hereinafter called the Acts. Juris-
diction is conferred upon the Court by said Acts.

II.

The defendant Southern California Edison Co., Ltd.,
was at all times herein mentioned a corporation organized
and existing under and by virtue of the laws of the State
of California, having its principal office and place of busi-
ness in the City and County of Los Angeles, State of

California. That on May 6, 1947, said defendant, Southern California Edison Co., Ltd., changed its corporate name to Southern California Edison Company. That at all the times herein mentioned, said defendant was and now is engaged in the generation, distribution and sale of electric power. That during all of the times herein mentioned, the defendant distributed and sold electric power within the State of California, which was generated at Boulder Dam, Arizona. Defendant, at all times herein mentioned, distributed, sold and delivered electric power generated by it to railroads, army and navy camps, Western Union and Telegraph Agencies, commercial airports, radio broadcasting stations, newspapers, oil producing companies, motion picture producers, fruit packing plants, and to numerous other industrial concerns which used such electric power for the lighting of their establishments and for the operation of machinery and equipment necessary to the transportation, transmittal, manufacturing, processing and production of goods for interstate commerce.

III.

That the defendant employed the plaintiffs named in the caption of this action in processes and occupations necessary to the generation, distribution and sale of the aforesaid electric power by defendant in interstate commerce, and in processes and occupations necessary to the production, distribution and sale of goods in interstate commerce by the customers of defendant. That the plaintiffs during the period covered hereby were employed by defendant in the following capacities:

Name	Capacity
Howard L. Andersen	Substation Attendant and Relief Operator (Substation)
Andy G. Austin	Substation Attendant
C. C. Blenis	Substation Attendant
Harold A. Boynton	Substation Attendant
W. D. Burton	Substation Attendant
E. K. Dickerson	Substation Attendant
Floyd E. Downs	Substation Attendant and Relief Operator (Substation)
Merle Edgerton	Substation Attendant
Eugene L. Ellingford	Substation Attendant
C. R. Frazier	Substation Attendant
Myron E. Glenn	Substation Attendant
Lawrence G. Hagerman	Substation Attendant and Hydro Station Attendant
P. G. Hanlon	Substation Attendant and Substation Relief Operator
William E. Hogg	Substation Attendant and Substation Relief Operator
Oathy G. Horne	Substation Attendant
W. S. Hostetler	Substation Attendant
L. F. Hudson	Substation Attendant [170]
Frank Johnson (now deceased)	Substation Attendant
Paul L. Lowery	Substation Attendant and Substation Relief Operator
Verner Neher	Substation Attendant and Substation Relief Operator
Thomas E. Osborne	Substation Attendant and Substation Relief Operator
Marion S. Poston	Substation Attendant

Name	Capacity
M. E. Roach	Substation Attendant and Hydro Plant Operator
G. W. Stark	Substation Attendant
E. N. Sweitzer	Substation Attendant
Archie Tregoning	Substation Attendant
Robert C. Green	Substation Attendant
F. E. McClanahan	Substation Attendant
F. D. Schwalbe	Substation Attendant
Harlan E. Mayes	Substation Attendant and Substation Relief Operator
Arthur E. Fontaine	Substation Attendant and Substation Relief Operator
Lawrence E. Jackson	Substation Attendant
Richard W. Rodenbeck	Substation Attendant and Substation Relief Operator
Rudolph C. Greiner	Substation Attendant and Substation Relief Operator
H. J. Krekeler	Substation Attendant and Substation Relief Operator
C. E. Foster	Substation Attendant
J. A. Henle	Substation Attendant
L. W. Hennig	Substation Attendant and Substation Relief Operator [171]
Herbert S. Kaneen	Substation Attendant
Edward M. Kirste	Substation Attendant and Substation Relief Operator
Sidney F. LaFond	Substation Attendant
George F. Larsen	Substation Attendant
L. S. Morgan	Substation Attendant and Substation Relief Operator
Benjamin E. Moses	Substation Attendant and Substation Relief Operator

Name	Capacity
J. W. McKernan	Substation Attendant
Charles S. Myrenius	Substation Attendant
Arthur L. Neff	Substation Attendant
James C. Schrader	Substation Attendant
Harold A. Trunnell	Substation Attendant
V. V. B. Wert	Substation Attendant
J. J. Bryan	Hydro Station Attendant
E. G. Eggers	Head Works Tender
F. E. Griffes	Hydro Station Attendant
G. H. Bartholomew	Head Works Tender
Merle Bartholomew	Hydro Station Attendant
Loyd H. Bell	Hydro Station Attendant
Monroe H. Huntington	Hydro Station Attendant
Roye B. Johnson	Hydro Station Attendant
Fred C. Ray	Head Works Tender
C. Rogers	Hydro Station Attendant
George C. Wooldridge	Head Works Tender
Paul W. Cockrell	Primary Serviceman
J. D. Borden	Primary Serviceman
John H. Smith	Primary Serviceman
W. H. Culbertson	Primary Serviceman
A. L. Honnell	Primary Serviceman [172]
L. A. Phinney	Primary Serviceman
Clarence C. Prinslow	Primary Serviceman

IV.

That plaintiffs at all times mentioned in this action were employed by defendant under an express provision of an oral and written agreement in effect during all of the time of their employment; that pursuant to said agreement, plaintiffs were employed at a stipulated monthly salary

based on 40 hours of work each week and were to receive in addition thereto, additional compensation at one and one-half times their regular hourly rate for all hours worked in excess of forty hours in each work week. That plaintiffs worked in excess of forty hours in each work week during the period covered by this action, but did not receive the compensation required by the Acts, although all of said work time and overtime was compensable under said agreement and said Acts.

V.

That Nellie M. Johnson is the duly acting, qualified and appointed administratrix of the estate of Frank Johnson, deceased, plaintiff herein, who was employed as a substation attendant and substation operator by defendant for a period of three years prior to the filing of this action.

VI.

That the plaintiff, Loyd H. Bell, was in the military service of the United States between September 22, 1942, and March 10, 1943; that pursuant to Section 205 of the Soldiers & Sailors Civil Relief Act of 1940, and amendments thereto, the period of his military service cannot be included in computing any period of limitation for the bringing of this action. [173]

That the plaintiff, Herbert S. Kaneen, was in the military service of the United States between July 20, 1945, and March 29, 1946; that pursuant to Section 205 of the Soldiers & Sailors Civil Relief Act of 1940, and amendments thereto, the period of his military service cannot be included in computing any period of limitation for the bringing of this action.

That the plaintiff, Lawrence E. Jackson, was in the military service of the United States between December 7, 1943, and January 28, 1944; that pursuant to Section 205 of the Soldiers & Sailors Civil Relief Act of 1940, and amendments thereto, the period of his military service cannot be included in computing any period of limitation for the bringing of this action.

That the plaintiff, Paul W. Cockrell, was in the military service of the United States between October 29, 1943, and the present date; that pursuant to Section 205 of the Soldiers & Sailors Civil Relief Act of 1940, and amendments thereto, the period of his military service cannot be included in computing any period of limitation for the bringing of this action.

That the plaintiff, Myron E. Glenn, was in the military service of the United States between July, 1944, and the present date; that pursuant to Section 205 of the Soldiers & Sailors Civil Relief Act of 1940, and amendments thereto, the period of his military service cannot be included in computing any period of limitation for the bringing of this action.

VII.

That on frequent occasions during three years prior to the filing of this action, since March 19, 1942, in the case of those plaintiffs who are not veterans and for a longer period than three years in the case of the plaintiffs who are veterans, the defendant employed all of the plaintiffs for [174] certain hours in excess of the work weeks established by Section 7 (a) (1) (2) (3) of the Fair Labor Standards Act of 1938; that the defendant failed to pay the compensation for overtime hours in excess of the work weeks prescribed by the provisions of said Sec-

tion; that the dates of employment, number of hours and amounts of compensation for such overtime for the plaintiffs is a matter reported on the books kept by the defendant; plaintiffs have no accurate record of said dates, hours and compensation claimed to be due, owing and unpaid from the defendant to the plaintiffs, and, accordingly, an accounting should be rendered by the defendant to the plaintiffs from the time that plaintiffs were so employed to the date that this action is adjudged, to determine the amount of said claims. That all of the records of said dates, hours and compensation claimed to be due, owing and unpaid from defendant to the plaintiffs are in the possession of the defendant. That there is due and owing and unpaid from the said defendant to the said plaintiffs such compensation for the time during which they and each of them were employed in excess of the work weeks established by said Act in such amounts as shall be determined by said accounting.

VIII.

That the plaintiffs are entitled to additional sums equal to the amounts claimed by them, as liquidated damages by virtue of the provisions of Section 16 (b) of the Fair Labor Standards Act; that plaintiffs have employed David Sokol, attorney duly authorized to practice in the above-entitled Court, and by virtue of said Section 16 (b) said attorney is entitled to be awarded a reasonable attorney's fee herein.

And by Way of a Further, Separate and Distinct Cause of Action, Plaintiffs Allege: [175]

I.

Plaintiffs repeat and reallege all of the allegations set forth in paragraphs I, II, III, V, VI, VII and VIII of the first cause of action herein as though the same were set forth herein in full.

II.

That by custom and practice in effect at the time of employment of plaintiffs, and at the time that plaintiffs worked overtime as hereinabove set forth, all of said overtime work was compensable.

Wherefore, plaintiffs prays that the defendant be required to account to plaintiffs and each of them for the total number of hours which each has been employed, up to and including the date that this matter shall be determined, in excess of the minimum work weeks prescribed by said Act, and the amount of compensation that is required to be paid by said Acts, and that upon said sums being computed, a judgment be entered for the plaintiffs and each of them, and against defendants for such amounts as the accounting will show that they are entitled to receive, together with an additional amount as liquidated damages, and a reasonable sum for attorney's fees, costs herein and interest on the amounts due.

DAVID SOKOL

Attorney for the Plaintiffs Herein [176]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 2, 1947. Edmund L. Smith,
Clerk. [177]

[Title of District Court and Cause]

NOTICE OF MOTION FOR PARTIAL SUMMARY
JUDGMENT

To the Defendant and Its Attorneys:

You and Each of You Will Please Take Notice that all of the plaintiffs, substation attendants and operators and substation relief men in the above entitled action, upon the Affidavit of B. E. Moses, Robert C. Green, Oathy G. Horne, George F. Larsen, Floyed E. Downs, F. E. McClanahan, G. W. Starke, E. N. Sweitzer, Archie Trengoning, C. C. Blenis and W. B. Burton, the points and authorities herein and upon all of the pleadings, admissions and stipulations heretofore had, will move this Court on the 22nd day of September, 1947, at 10:00 A. M. or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Rules of Civil Procedure granting partial summary judgment in favor of the plaintiffs who are substation attendants and operators and substation relief men, and referring the matter to a Special Master for the purpose of computing the amount of damages due [178] to each such plaintiff, and upon such determination granting such plaintiffs herein an equivalent amount for liquidated damages and an additional amount for a reasonable attorney's fee, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Los Angeles, August 29, 1947.

DAVID SOKOL

Attorney for Plaintiffs. [179]

Received copy of the within this 2 day of Sept., 1947.
Norman S. Sterry.

[Endorsed]: Filed Sep. 2, 1947. Edmund L. Smith,
Clerk. [180]

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT

State of California

County of Los Angeles—ss.

The undersigned plaintiffs in the above entitled action being substation attendants and operators and substation relief men state that the following is a true account of the nature of the work of such plaintiffs for the period covered by this action.

Nature of Work Performed

A—Hours of Employment

1. The employment agreement between the plaintiffs and defendant provided that they would be employed in their capacities as substation men and were required to be and remain at all times on the defendant's premises for 24 hours of each day of work; during which period they were required to be available at all times to perform the duties required of them by defendant.

Plaintiffs were not permitted to leave defendant's premises [181] except in emergency when granted permission to leave, or on their days off only, and then only when a qualified operator was available to replace them at the particular substation. If the plaintiffs substation attendants and operators left the premises unattended at any time during their 24 hour work day they were subject to dismissal.

During the 24 hour period of each work day the plaintiffs were at all times subject to the rules and regulations and authority of the defendant and were at all times during said 24 hour period of each work day amenable to

defendant's discipline and instructions as to work and conduct on the premises.

2. Conditions of Work for substation attendants and operators.

The plaintiffs who were substation operators and attendants were required as a condition of their employment to live only on the premises of the defendant in houses rented from the defendant, for which they paid rent and paid for the utilities. The substation itself, the switch-yard and the home adjacent thereto were enclosed by a fence of steel construction. In accordance with the posted rules of the defendant, no one was permitted to go into the substation building or switch-yard except the operator or an authorized Edison employee.

In the substation building itself there are located various switching devices as well as much electrical equipment. Adjacent to the home, and in the general area, are located other electrical equipment consisting of switches, transformer banks, regulators, condensers, switch control mechanism, batteries and various other types of electrical equipment.

On the outside of the substation building there is an alarms bell approximately 3 or 4 inches in diameter which can be heard over an area of several hundred feet.

In the home of the substation operators, as distinguished from the substation building, there was located a telephone of the private line of the Edison system, and in many stations an outside [182] telephone used for communicating with persons outside of the Edison system and with customers and users of power.

There was also in the home an alarm bell approximately 3 or 4 inches in diameter, located usually above the kitchen

door, which could be heard throughout the immediate area. On the premises of the substation there was located a small building used as relief quarters and garage. Relief quarters are used by the relief operator. The relief operator does not have his home on the premises, but lives elsewhere and travels from station to station.

Relief quarters consist of a small room in which is located a lavatory and shower. The relief operator is usually on the premises one day, however, he may be there longer if the regular attendant is away on vacation or for a longer period of relief. In the relief quarters there is the same type of alarm bell and telephone as in the home.

3. Routine Duties of the Substation Plaintiffs

To inspect station each morning; make routine trip tests on oil circuit breakers; hourly readings of line loads and temperatures; check meter readings after street lights are turned on in order to check for peak loads on each line; turn on street lamps as per code signals; report to switching center; take instructions and battery readings and record same; maintain daily log; perform routine and emergency switching; maintain buildings and grounds in clean and orderly condition. This involves maintaining lawns and grounds around station and home as well as washing and polishing of station interior. Answer calls from customers after the district office of the defendant in the particular town served by the station is closed.

The plaintiffs usually spend their time up to 6 p. m. in and about the substation building. Dependent upon the season of the year they would have to be in the substation building later to turn on the street lights.

At night, plaintiffs were usually in their homes, although [183] they might spend time within the substation

also, if they so desired, or when required by emergency. In their homes, where there was an outside telephone for customers' calls, the telephone would ring and would be answered by the attendant or operator, or relief man. These calls came to the substation after the closing of the district office of the defendant in the town or towns served by the substation. The calls related to customers' complaints, such as blown out fuses, interrupted services and the like, and the substation attendants and operators would see that the trouble was taken care of.

On receipt of such calls the plaintiffs either rendered such advice as they could over the telephone, or called the switching center in order to have trouble shooters sent out. There was an average of 400 calls per month of this nature. The plaintiffs, substation attendants and operators and relief men, did not receive during the period covered hereby, their overtime pay for these telephone calls or compensation of any kind for such work, nor did they receive pay for the work in connection with street lighting.

Telephone calls relating to trouble were answered by the station attendants and operators during the day where there was no district office in the area.

When the street lights went on, an alarm bell would ring in the station and if it did not turn off, the plaintiffs would have to go to the station and then reset the alarm, otherwise no other alarms would be received that night in case of trouble. Also, the plaintiffs would have to go to the station to see that the proper loads were carried on the street lights.

In addition to the foregoing, the Edison private line itself would ring at various intervals throughout the night, and the plaintiffs were required to listen to their particular

signal. Thus the plaintiffs were awakened by all the calls coming into the home, interrupting their sleep, and they had to be alert at all times to perform the defendant's requirements. [184]

4. Effect of the 24 hour tour of duty.

Because the plaintiffs were required on the premises of defendant for 24 hours each work day as a condition of employment, and were not free to go and come as they pleased after their regular 8 hours work, but were required to hold themselves in instant readiness to serve defendant, the normal living of the plaintiffs was interrupted. The requirement that plaintiffs listen for the telephone signals and alarms at night, affected their night time sleeping hours and their normal living.

If a qualified relief man was not available to relieve plaintiffs on their days off, they would have to remain on the premises 24 hours each day until relief was obtained. Sometimes this resulted in the plaintiffs not having sufficient food available for a period of time and endangered the health of the plaintiffs and their families.

In case of illness, since the plaintiffs could not leave the premises, they were dependent upon physicians of the defendant who came to the premises in emergency.

Since some of the stations were located far from settled communities, the plaintiffs would have to do their shopping in larger communities on their days off, thus taking up a considerable part of their off duty time, on days when they were relieved.

The purpose of the defendant's rule requiring the plaintiffs to remain on the premises 24 hours each day, was for the sole benefit, convenience and necessity of the defendant. This is evident by the fact that if the plaintiffs

were not available throughout the 24 hours, destruction of the defendant's property would follow. Thus for example: A routine check of an ammeter will prevent the overloading of a power line. By transferring part of the power load to another line, damage is prevented to the line itself and loss of power to the customer. A regular check on the transformer bank may show the temperature dangerously high. By checking, the operator [185] may discover that the circulating pump is off. Failure to correct this may cause damage to defendant's equipment. Routine checks of the meters might show them behaving erratically, and by thus checking the switches the station attendant may discover that the switch contacts within the switch bank were arcing. Failure to discover this might mean that oil would become hot and explode and set fire to the switch, dropping the load on the bank and thus putting a lot of consumers out of service.

If the plaintiffs were not available to check the various instruments, transformers could be overheated and destroyed, causing loss in excess of \$50,000, cost of some of the transformers. A loss of service resulting from the failure of any of the plaintiffs to perform their required duties would result in large property losses to the defendant.

The plaintiffs' presence on the defendants' property 24 hours each work day is of vital importance to all industries in the area because even the failure to turn on street lighting would disrupt commerce.

B—Wages

Prior to the Fair Labor Standards Act of 1938 the plaintiffs received only their salary for all of the aforesaid duties. By order issued by the defendant, after the F. L.

S. A. went into effect, and throughout the period covered by this action, it was agreed that the plaintiffs would perform all of their aforesaid duties and would be paid a stipulated monthly salary, and that in addition, plaintiffs would receive time and a half their hourly rate bases upon a forty hour week for all hours worked in excess of 40 in any work week. The plaintiffs did, after December 24, 1943, receive overtime pay at one and one-half times their hourly rate for work denominated by the defendants in their answer as "extraordinary or emergency active duty."

The payment of overtime compensation for emergency active [186] duties relates only to emergency calls during the nighttime hours, thus during the nighttime hours if there is an emergency situation affecting the substation the alarm bell rings and the station attendant or relief man must answer that alarm. If he is required to leave the home and go to the station to perform work, he has received the overtime as hereinafter set forth. However, if the alarm comes in and the employee has to dress in order to go out and perform the work and he is thereupon notified by telephone that it is not necessary, the station attendant has not received the overtime for such time. The overtime pay for the emergency callouts was subject to the following broad qualifications: Should the station operator perform emergency active duty after December 24, 1943 during the hours of 6:00 P. M. and 8:00 A. M. the operators were required to make specific note of such work and the time involved. Overtime payment for such work noted by the substation attendants was paid only after having received the specific approval of a division manager or clerk or switching center.

The Plaintiffs herein were paid for only forty hours per week together with the emergency callouts above referred to, except during the period of War Manpower Regulations when they received 8 hours overtime for the sixth day of work in the work week. For the balance of the time spent in waiting for emergency callouts and in the performance of various routine duties such as turning on street lights, checking peak loads, resetting alarms, and answering telephones plaintiffs did not receive compensation in accordance with the Act or the agreement between the parties.

Not only was this true in the case of the regular station attendant but it was also true in the case of the relief man who had his home away from the premises of the defendant and maintained a separate home and yet at the same time was required by the employment agreement to travel from station to station, day after day, attending to the requirements of the defendant, required to remain [187] on the premises of the defendant twenty-four hours of each work day, without receiving the compensation required by the Acts and agreement between the parties.

From an examination of the routine duties required of the plaintiffs, it is apparent that the regular duties of the plaintiffs normally and usually continued on into the hours of 6:00 P. M. to 8:00 A. M. The plaintiffs performed numerous functions by, for and at the order of the defendant which involved interruptions in their sleep and evening hours, for which they did not receive overtime compensation, as required by the Acts and agreement be-

tween the parties. Thus, for example, time spent in answering short alarms, or the 10 to 15 trouble calls from consumers that were usually received, or the task of turning street lights on and off and checking meters to prevent overloading of power lines, all such normal and routine tasks performed between the hours of 6:00 P. M. and 8:00 A. M. were not compensated for by the defendant.

When overtime payments were made they were calculated by the defendant in the following manner: Plaintiffs' monthly rate of pay was multiplied by 12 (the number of months in the year) and divided by 52 (the number of weeks in the year) and this was divided in turn by 40 (the stipulated hours of work in the week). It was in this manner that the hourly rate was arrived at, and it was on said hourly rate that the defendant paid for some of the overtime as aforesaid at time and one-half the hourly rate.

Plaintiffs now seek an accounting so that they will be compensated for all of such work. [188]

The undersigned plaintiffs in the above entitled action have read the foregoing affidavit and the same is true of their own knowledge.

B. E. MOSES

Subscribed and sworn to before me this 21st day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

ROBERT C. GREEN

Subscribed and sworn to before me this 21st day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

OATHY G. HORNE

Subscribed and sworn to before me this 21st day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

GEORGE FRANK LARSEN

Subscribed and sworn to before me this 22nd day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

FLOYD E. DOWNS

Subscribed and sworn to before me this 22nd day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

F. E. McCLANAHAN

Subscribed and sworn to before me this 23rd day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

G. W. STARKE

Subscribed and sworn to before me this 23rd day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

E. N. SWEITZER

Subscribed and sworn to before me this 26th day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

ARCHIE TREGONING

Subscribed and sworn to before me this 26th day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

C. C. BLENIS

Subscribed and sworn to before me this 26th day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

W. B. BURTON

Subscribed and sworn to before me this 26th day of August, 1947.

(Seal)

DAVID SOKOL

Notary Public in and for Los Angeles County,
State of California

[Endorsed]: Filed Sep. 2, 1947. Edmund L. Smith,
Clerk. [190]

[Title of District Court and Cause]

REQUEST FOR ADMISSIONS

To the Defendants and Their Counsel:

Please Take Notice that pursuant to Rule 36 of the Federal Rules of Civil Procedure, you are requested to admit within fifteen (15) days hereof, for purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the following:

1. That the following documents are genuine as of the dates thereon; and were effective during period of this action:

- a. Division order #4, dated January 21, 1935, attached hereto as Exhibit "A".
- b. Operating Department order affecting substation employees, signed by C. M. Cavner, attached hereto as Exhibit "B". [191]
- c. Operating Department order #A-26, dated July 1, 1935, attached hereto as Exhibit "C".
- d. Operating Department order #A-30, dated June 11, 1935, attached hereto as Exhibit "D".

2. You are further requested to admit subject to all pertinent objections as to admissibility which may be interposed at the trial, the following:

- a. That at all times covered by this action there was in effect the following paragraphs in orders #A-36, dated January 1, 1942, and revised January 1, 1943, introduced in evidence at the pre-trial as plaintiffs' Exhibits "1" and "2"; such paragraphs reading as follows:

“(4) Week-period employees, which includes station attendants and any other employe who may be temporarily assigned to this classification.”

“(4) Week-period employees have no regular scheduled working hours and are subject to call twenty-four hours per day on each day worked. Forty hours of work shall constitute a work-week. Days off shall be equivalent to two days a work-week. The work-week is established as starting Monday and continuing through the following Sunday.”

DAVID SOKOL

Attorney for Plaintiffs [192]

EXHIBIT “A”

Copy

Division Order #4

Distribution Substations

Southern and Long Beach Division

January 21, 1935

SOUTHERN CALIFORNIA EDISON COMPANY
LTD.

Subject: Taking Leave from Station

To: Station Chiefs

No Station Chief shall leave his Station (emergencies excepted) without first obtaining his Division Superintendent's permission, except when regularly relieved for days off.

Before seeking the approval of the Division Superintendent:

1. One Man Station: Chief to call respective switching center and inquire if arrangements can be made to have responsible operator relieve you. If not, it may be possible for Division Superintendent's office to make arrangements.

2. Two men or more Station: Chiefs be positive that your operator relieving you is capable of handling Station.

3. Switching Center Station: Chiefs arrange to have your second man at Station in your absence.

In other words, never request to leave your station without having a qualified operator for your Station, able to relieve you. Have complete story before calling Division Superintendent.

Incorporate above which is applicable to your Station, in your Station Instructions.

(Sgd.) C. M. CAVNER

C. M. CAVNER, Division Supt.

Approved:

L. L. Dyer

Supt. Dist. Substations

E. N. Sweitzer

Tom Neal R. Ledin [193]

EXHIBIT "B"

Copy

Southern California Edison Company, Ltd.

Operating Department,

Working Conditions And Payment of Wages. (Revised
Jan. 1, 1943)

Sheet #2, Section #5, Hours of labor. Heading B (4)

Week Period Employees: Have no regular scheduled working hours and are subject to call 24 hours per day on each day worked.

Forty hours of work shall constitute a work-week. Days off shall be equivalent to two days a work-week. The work-week is established as starting Monday and continuing through the following Sunday.

(Signed) C. M. Cavner

Superintendent of Substations

(Signed) H. W. Tice

Mgr. of Operation

Sheet # 1, Section #4 Classification of Employes,
Heading B (4).

Week Period Employees: Which includes station attendants and other employes who may be temporarily assigned to this classification. [194]

EXHIBIT "C"

Operating Department
Substation Organization
July 1, 1935

A-26

Personal Conduct

Do not indulge in any practice which may reflect adversely upon yourself or the Company. If there is any question in your mind at any time as to what your conduct in connection with the job should be, do not hesitate to ask your Division Superintendent for his opinion.

Guard your tongue

This applies to the giving of information to press reporters or to the public. When people wish information concerning the Company, direct them courteously to the District Manager's office.

Use of Radio while on Duty

The use of radios in the station building is prohibited at all times, except upon special approval of the Division Superintendent. Radios in relief quarters are never to be played in such a manner as to interfere with the operator's ability to hear alarms or to note any abnormal condition at the station.

Charging Personally-owned Storage Batteries

The charging of personally-owned storage batteries by the use of station M. G. Sets falls into the same class with jumpers on meters, and may be dealt with accordingly.

L. L. Dyer,

Supt. Distribution Substations.

D. J. Kennelly,

Supt. Transmission Substations. [195]

EXHIBIT "D"

Operating Department

A-30

Substation Organization

June 11, 1935

Reporting on Telephone, Use of Telephone

Checking Time and Setting Clocks

Each attended station will report to their respective Switching Center at regular hours each day according to a local schedule established at each location by the Division Superintendent. The last report of the day should include anything of importance or of an unusual nature which occurred at the station during the day, such as Electricians there, men on days off, vacations, sickness, switch kick outs, interruptions, etc.

Should you have any trouble at your station, such as a mistake in switching, equipment break down, burn out, accident, etc., notify your Switching Center by telephone immediately and follow up with a written report to your Division Superintendent. The Switching Center will notify the Division Superintendent's Office at once.

The Switching Centers will report directly to the Division Superintendent each morning when he is on the job, and he will designate the station in the Division which will receive the daily morning report on Saturdays, Sundays and holidays. These morning reports to the Division Superintendent should be completed by 7:45 A. M. so that he can make his report to the General Office between 7:50 a. m. and 8:20 a. m.

At the time of the earliest report each morning, each station is expected to check time with the switching center, and be sure that the station clock is indicating correct time.

When the operator in a one or two men station goes to his cottage or relief quarters for lunch, or when going off shift for the night, he is to call the switching center from the cottage or [196] relief quarters, and have the switching center test his telephone bells to be sure he is in communication. The switching center will keep a temporary record of the time and origin of calls from outlying stations, calling to the attention of the Division Superintendent, persons who are consistently irregular in these matters. These regulations are established in the interest of better service and protection of the men. Experience has shown that safety and a high degree of service are maintained only by careful following of routine with constant attention to checking every detail; therefore full cooperation of all men is expected.

L. L. Dyer,
Supt. Distribution Substations.

D. J. Kennelly,
Supt. Transmission Substations.

[Endorsed]: Filed Sep. 19, 1947. Edmund L. Smith.
Clerk. [197]

[Title of District Court and Cause]

ANSWER TO THIRD AMENDED COMPLAINT

Comes now the defendant, and for answer to the Third Amended Complaint on file herein:

Answer to the First Alleged Cause of Action

Specifically answering Paragraph II of the first alleged cause of action in said complaint contained:

I.

(A) Defendant admits that electrical energy generated at Boulder Dam in Arizona was transmitted to certain of defendant's major substations in California, but denies that the electrical energy so received was distributed or sold in the State of California as generated, and in this connection alleges that after it was received, it was passed through the defendant's transformers at its [198] major substations and its voltage reduced or stepped down, and after being so reduced or stepped down it was transmitted into defendant's power lines and commingled with electric energy obtained by defendants from other sources in California, and the commingled electrical energy was sold to defendant's various customers within California. Defendant alleges that none of the plaintiffs performed any service necessary or incident to the receipt of said electrical energy or reducing or stepping down its voltage.

(B) Defendant, basing its answer on its information and belief as to the effect of the facts hereinabove alleged, avers that all of the said sales of electric energy by said defendant were intrastate sales and not interstate sales.

II.

Specifically answering Paragraph III of said first alleged cause of action in said complaint contained:

(A) Defendant admits that it employed each of the said plaintiffs named herein at some time subsequent to March 19, 1942, in the classifications and during the times as follows, and at no other times or periods:

<u>Name</u>	<u>Capacity</u>	<u>Period (All dates inclusive)</u>
Howard L. Andersen	Substation Attendant and Relief Operator (Substation)	) Before 3/19/42 to 9/26/43
	Apprentice Operator —Hydro	) 9/27/43 to 9/7/44
Andy G. Austin	Substation Attendant	9/9/43 to 10/9/44
C. C. Blenis	Substation Attendant	9/25/44 to Present
Harold A. Boynton	Substation Attendant	Before 3/19/42 to 8/31/43
W. B. Burton	Substation Attendant	3/23/43 to Present
E. K. Dickerson	Substation Attendant	Before 3/29/42 to 6/12/42
[199]		
Floyd E. Downs	Substation Attendant and Relief Operator (Substation)	4/3/44 to 8/28/44
Merle Edgerton	Substation Attendant	3/19/42 to 9/21/45
Eugene L. Ellingford	Substation Attendant	Before 3/29/42 to Present
C. R. Frazier	Substation Attendant	Before 3/29/42 to Present
Myron E. Glenn	Substation Attendant	Before 3/29/42 to 7/10/44; 3/11/46 to 3/25/46
Lawrence G. Hagerman	Substation Attendant and Hydro Station Attendant	) 3/25/43 to 2/21/44
P. G. Hanlon	Substation Attendant and Substation Relief Operator	) 1/21/43 to Present
William E. Hogg	Substation Attendant and Substation Relief Operator	) 5/12/43 to 1/7/45

<u>Name</u>	<u>Capacity</u>	<u>Period (All dates Inclusive)</u>
Oathy G. Horne	Substation Attendant	Before 4/13/42 to 8/31/44
W. S. Hostetler	Substation Attendant	Before 3/29/42 to 9/30/45
L. F. Hudson	Substation Attendant	4/28/43 to Present
Frank Johnson (now deceased)	Substation Attendant	Before 3/19/42 to 12/13/45
Paul L. Lowery	Substation Attendant and Substation Relief Operator	) 5/16/44 to 10/31/44))
Verner Neher	Substation Attendant and Substation Relief Operator	) 11/17/44 to) Present)
Thomas E. Osborne	Substation Attendant and Substation Relief Operator	) 6/21/44 to 10/14/44))
Marion S. Poston	Substation Attendant	2/15/43 to 7/17/44 [200]
M. E. Roach	Attendant—Hydro Plant and Hydro Plant Operator	) Before 3/19/42 to) 7/31/43)
G. W. Stark	Substation Attendant	Before 3/19/42 to 2/28/47
E. N. Sweitzer	Substation Attendant	Before 3/19/42 to 1/31/47. (Retired 2/1/47 and immedi- ately rehired on spe- cial contract as Sub- station Attendant.
Archie Tregoning	Substation Attendant	10/1/42 to Present
Robert C. Green	Substation Attendant	Before 3/19/42 to Present
F. E. McClanahan	Substation Attendant	Before 3/19/42 to Present
F. D. Schwalbe	Substation Attendant	Before 3/19/42 to Present
Harlan E. Mayes	Substation Attendant	1/5/43 to Present
Arthur E. Fontaine	Substation Attendant and Substation Relief Operator	) 4/23/45 to 12/15/45))
Lawrence E. Jackson	Substation Attendant	6/22/42 to 12/6/43; 2/14/44 to Present
Richard W. Rodenbeck	Substation Attendant and Substation Relief Operator	) Before 3/19/42 to) Present)

<u>Name</u>	<u>Capacity</u>	<u>Period (All dates inclusive)</u>
Rudolph C. Greiner	Substation Attendant and Substation Relief Operator	) 3/4/43 to Present)
H. J. Krekeler	Substation Attendant	6/13/44 to Present [201]
C. E. Foster	Substation Attendant	1/8/45 to Present
J. A. Henle	Substation Attendant	9/16/43 to Present
L. W. Hennig	Substation Attendant and Substation Relief Operator	) Before 3/19/42 to 3/25/43)
Herbert S. Kaneen	Substation Attendant	Before 3/19/42 to 10/31/43; (various occupations not included in this suit, 11/1/43 to present)
Edward M. Kirste	Substation Attendant	Before 3/19/42 to Present
Sidney F. LaFond	Substation Attendant	Before 3/19/42 to Present
George F. Larsen	Substation Attendant	2/9/43 to Present
L. S. Morgan	Substation Attendant and Substation Relief Operator	) 8/1/42 to 12/6/45)
Benjamin E. Moses	Substation Attendant Substation Relief Operator	) Before 3/19/42 to 12/31/46 (Utility Man—Territorial—1/1/47 to present))
J. W. McKernan	Substation Attendant	Before 3/19/42 to Present
Charles S. Myrenius	Substation Attendant	4/20/42 to 11/27/42
Arthur L. Neff	Substation Attendant	4/22/42 to Present
James C. Schrader	Substation Attendant	Before 3/19/42 to Present
Harold A. Trunnell	Substation Attendant	10/8/45 to Present
V. V. B. Wert	Substation Attendant	Before 3/19/42 to Present
J. J. Bryan	Hydro Station Attendant	) Before 3/19/42 to Present)
E. G. Eggers	Head Works Tender	6/1/44 to 12/31/46; (Utility Man 1/1/47 to present)
F. E. Griffes	Head Works Tender	Before 3/19/42 to Present

<u>Name</u>	<u>Capacity</u>	<u>Period (All dates inclusive)</u>
G. H. Bartholomew	Head Works Tender	Before 3/19/42 to Present (Temporarily employed in other occupations: Mechanic's Helper 2/15/44 to 3/7/44; Power Equipment Operator 3/8/44 to 3/20/44; Tractor Driver 3/21/44 to 5/18/44, etc.)
Merle Bartholomew	Head Works Tender	Before 3/19/42 to 8/31/45 (Stream Gauger 9/1/45 to Present)
Loyd H. Bell	Head Works Tender	6/1/42 to 10/5/42 (Guard 5/18/43 to 10/31/44); 11/1/44 to Present
Monroe H. Huntington	Hydro Station Attendant	9/16/42 to 10/31/44
Roye B. Johnson	Hydro Station Attendant	11/1/42 to Present
Fred C. Ray	Head Works Tender	Before 3/19/42 to Present
C. Rogers	Hydro Station Attendant	9/1/42 to Present
George C. Wooldridge	. . . . .	(Utility Man 10/1/42 to 11/30/42)
.	Head Works Tender	12/1/42 to 10/31/43
Paul W. Cockrell	Primary Serviceman	12/1/42 to 10/28/43; 12/18/45 to 8/31/46
J. D. Borden	Primary Serviceman	3/19/42 to 1/14/47
John M. Smith	Primary Serviceman	9/7/44 to 4/15/45; 4/22/45 to 6/14/45; 6/18/45 to 6/30/45
W. H. Culbertson	Primary Serviceman	3/19/42 to 8/31/42
[203]		
A. L. Honnell	Primary Serviceman	12/1/42 to 3/23/47
L. A. Phinney	Primary Serviceman	3/19/42 to 9/6/44; 9/25/44 to 12/31/44
Clarence C. Prinslow	Primary Serviceman	11/12/43 to 4/8/45

The following plaintiffs while remaining in the employ of the Company were absent from service because of industrial accidents during the periods as follows:

W. B. Burton.....1/9/44 to 1/18/44, inclusive

Herbert S. Kaneen.....3/23/44 to 3/29/44, inclusive [204]

(B) Defendant alleges that a number of the plaintiffs, during a portion of the time that they were employed as substation attendants or hydro station attendants, as hereinbefore set forth, were employed at three-shift stations, as hereinafter defined.

(C) Defendant denies that any of the said plaintiffs were employed in any occupation necessary to the generation or sale of electrical energy or power in interstate commerce, and in this connection defendant, basing its answer upon its information and belief as to what constitutes intrastate sales, alleges that all, each and every one of its said sales of electrical energy were intrastate. Defendant denies that any of said plaintiffs were engaged in any occupation necessary to the generation, distribution, or sale of electrical energy in interstate commerce, and in this connection alleges that all of said plaintiffs who were primary servicemen or substation operators and attendants or substation relief operators and attendants were not engaged in any occupation incident to or connected with the generation of electrical energy, but that their occupation was incident to the distribution of electrical energy by the defendant herein, and that all of the plaintiffs who were employed as head works tenders or hydro station attendants or hydro station relief attendants were engaged in occupations incident to the generation of electrical energy, but not connected with or incident to its distribution.

(D) Defendant believes and therefore admits that some of its customers to whom its electrical energy was deliv-

ered were engaged in the production of goods for interstate commerce, and that some of such customers used the electricity so furnished in the production of such goods.

III.

Specifically answering Paragraph IV of said first alleged cause of action in said complaint contained:

(A) Defendant admits that each said plaintiff was employed by the defendant in the capacity and during the times [205] heretofore set forth in Paragraph II hereof. Except as herein admitted, defendant denies each and every allegation, matter and fact in said Paragraph IV of said complaint contained, generally and specifically.

(B) Further, in connection with the denial of the allegations of Paragraph IV, and in further answer to said Paragraph IV of said first alleged cause of action in said complaint, defendant alleges that each plaintiff was orally employed, and denies that the agreement as to compensation of any said plaintiffs was as in said Paragraph IV alleged. On the contrary, the said defendant alleges that each plaintiff was employed at a monthly salary which was accepted by such plaintiff and was understood and agreed by him to be the full and only compensation for all services to be performed by said employee except for emergency services performed during the nighttime hours, as the terms "emergency services" and "nighttime hours" are hereinafter defined.

(C) Defendant alleges that the plaintiffs listed and described as primary servicemen were scheduled to and did for five days a week work on an eight-hour shift per day; that at the end of each said shift each said primary serviceman was free to engage in any activity which he saw fit, except that during certain days of the week he was

required to leave with the defendant a telephone number where he could be reached in case his services were needed, and that each said plaintiff was paid not less than time and one-half for any actual service performed by him beyond the total of forty hours per week, or outside of his regular scheduled working hours.

At Santa Paula as there was no station attendant, the names of the primary servicemen were listed as such in the local telephone book, and during certain days of the week each of said primary servicemen, in addition to the requirement that on said days if he left his residence he furnish the defendant with a [206] telephone number where he could be reached in case of an emergency, was required to take complaint calls at his residence direct from customers. For brevity of designation, hereafter the time between shifts will be designated as to primary servicemen by the term "nighttime hours," and any services performed during said period, other than leaving their telephone numbers with the defendant or receiving telephone calls direct at their residence, as "emergency services." Each said primary serviceman, including each plaintiff employed in said capacity, was paid not less than time and a half for such emergency services performed during said nighttime hours.

Defendant alleges that there was no contract between any said primary servicemen, including each plaintiff employed in said capacity, and the defendant to pay said primary servicemen anything additional for either receiving calls at their residences or leaving their telephone numbers with the defendant in case they left their residences; nor was there any payment for such activities by either custom or practice, or at all. The defendant alleges as aforesaid that no payments whatever were made to the

primary servicemen except the monthly salary, and not less than time and a half for emergency services as hereinbefore defined during the nighttime hours, as hereinbefore defined.

(D) Defendant alleges that at some of its substations and some of its hydro stations it operated what are known as three-shift stations, and that the operators worked a scheduled eight-hour shift; that at the expiration of said eight-hour shift they were free to go anywhere they pleased and to engage in any activity they pleased, and were paid not less than time and a half for any services performed by them either after or before their eight-hour shift.

For brevity of designation, periods between shifts will, as to said operators at three-shift stations, be referred to as "nighttime hours," and as to said operators any active service which they were called on to perform during said nighttime hours as [207] "emergency service." Defendant alleges that there was neither contract, custom, nor practice to pay said operators at three-shift stations anything other than a monthly salary, and not less than time and a half for emergency services, as hereinbefore defined, performed during nighttime hours.

(E) Defendant alleges that the said plaintiffs described as substation operators and attendants who worked at substations other than three-shift stations, were paid a monthly salary which was substantially in excess of the minimums provided for by the Fair Labor Standards Act; that as aforesaid it was agreed between each of said plaintiffs and the defendant that the said monthly salary should be full payment for normal services of each said plaintiff, whether active or inactive. Defendant further alleges that the normal active services required of substation operators

and attendants did not ordinarily require in excess of two to five hours a day, and often not more than two to three hours a day; that due to the nature of the work, except as to certain readings which they were required to make at designated hours at certain stations, and, during the winter months, switching at certain stations to turn on street lights, there were no scheduled hours of work for said substation operators and attendants, each substation operator and attendant being allowed to arrange his own hours of work as he saw fit; that the normal active duties of substation operators and attendants, including these plaintiffs, could be and were ordinarily performed during the daytime; that each substation operator and attendant was required by defendant to live on the property of the defendant for five days each week in a house located near the substation and rented to him by defendant, in order to be able to render necessary service at any time in case of an emergency; that each such resident substation operator had the privilege of having his family live with him. Defendant is informed and believes, and therefore alleges, that each and all of said substation operators having any [208] family availed themselves of said privilege; that if there were any cases in which a substation operator did not do so, it was because for personal reasons he did not desire to have his family or some particular member of it reside with him. Defendant further alleges that during the time he was not required to perform any active service each such plaintiff could engage in any activity he desired which did not take him beyond such distance from the substation or his residence as to prevent his being able to hear a signal requiring emergency service. Defendant further alleges that because of the nature of the employment, it was understood and agreed between each substation operator and attendant, including each plaintiff em-

ployed in that capacity, and the said defendant that, evaluating the employment as a whole, the inactive duties of each said plaintiff and the normal active duties were the equivalent of not more than eight hours of active service. Defendant further alleges that, as hereinbefore alleged, each of said plaintiff substation operators and attendants at all times mentioned herein was paid a monthly salary which, as hereinbefore alleged, was paid and received as compensation for all normal active and inactive services performed by said plaintiffs, but that in order to compensate said substation operators and attendants for extraordinary or emergency active duties, defendant, prior to March 19, 1942, until on or about December 24, 1943, paid to substation operators and attendants, including such of the plaintiffs as were then in its employ in said capacity, not less than time and a half for such active duties as they were called on to perform between the hours of 10:00 P. M. and 8:00 A. M., and from on or about December 24, 1943, paid such compensation for such services performed after 6:00 P. M. and prior to 8:00 A. M., said hours being hereinafter referred to for brevity of designation as to said substation operators and attendants and relief operators and attendants as "nighttime hours," and any active service performed by any of said plaintiffs during said nighttime hours, as hereinbefore defined, as [209] "emergency service." That the accounting department of defendant computed the hourly basis for such overtime compensation in the same manner that it computed the hourly basis for overtime compensation of any other operating employee, that is to say, by multiplying the monthly salary by 12 (the number of months in a year), and dividing the result by 52 (the number of weeks in a year), and dividing the result thus determined by 40. That said method of computing the hourly rate was that used as to

all employees of the defendant who were paid a monthly salary and was in accordance with the agreement between each said plaintiff and the defendant as hereinbefore alleged, and that considering the employment of each said plaintiff as a whole and the slight amount of active duties required, his employment was the equivalent of not more than eight hours of active service.

(F) Defendant alleges that the duties of the substation relief operators were the same as those of the substation operators and attendants, as alleged in Subparagraph “(E)” hereof, with the exception that such relief operators moved from station to station, normally being at any one station only one to two days, and living in housekeeping quarters provided for such purpose near said station. That the substation relief operators were not normally accompanied by nor did they, normally, live with the members of their families at the stations; but that their duties were, at each station, to relieve the operator, and during their stay at each station, their duties would be the same as those of the regular attendant of the station, and the terms and conditions of their employment were the same as hereinbefore alleged as to substation attendants; that is to say, they were paid a monthly salary which was substantially in excess of the minimums provided by the Fair Labor Standards Act. Said salary was paid to relief operators and attendants semi-monthly, and it was agreed between each said relief operator and attendant, including each plaintiff employed in that capacity, and the defendant that such salary should be full compensation for all normal services, [210] active or inactive, performed by each said relief operator and attendant; and it was understood and agreed between each said substation relief operator and attendant, including each plaintiff employed in that capacity,

and the said defendant that in evaluating the employment as a whole, the active and inactive duties of each such relief operator were the equivalent of not more than eight hours of active service. That prior to, and at all times since March 19, 1942, the said relief substation operators and attendants were, the same as resident substation operators and attendants, paid not less than time and a half for any emergency service performed by them during the nighttime hours, as the said terms "emergency service" and "nighttime hours" are hereinbefore defined in Subparagraph "(E)" hereof.

(G) That the said plaintiffs listed as head works tenders were employed in the Hydro Division, performing work incidental to the production of electrical energy, but not in its sale or distribution. That each said plaintiff had no scheduled working hours, but was allowed to plan his normal day's work and his lunch hour to suit his convenience. That each said plaintiff was paid a monthly salary which was substantially in excess of the minimums provided for in the said Fair Labor Standards Act, and it was agreed as aforesaid between each head works tender, including each plaintiff employed in that capacity, and defendant that said salary should be full compensation for all normal services, active or inactive, performed by each said plaintiff. That normally, the active duties of the plaintiff F. E. Griffes would take between seven and eight hours per day. Except for said plaintiff Griffes, the normal active duties of each plaintiff head works tender would occupy between four and eight hours per day, and on an average throughout a week, would be performed in substantially less than forty hours. That it was agreed between each said head works tender, including each said plaintiff employed in that capacity, and the defendant, that,

[211] evaluating the employment as a whole, the inactive duties of each said head works tender employee and his normal active duties were the equivalent of eight hours of active service. That at all times mentioned in said Third Amended Complaint, each head works tender has made his own time report. That on such time report there is a space provided for showing overtime. That prior to and ever since March 19, 1942, each head works tender has not reported less than eight hours of work for any day on which he has reported as working, irrespective of whether on that particular day he performed as much as eight hours of active duty or not; that whenever any head works tender (including each and all of the plaintiffs employed in such capacity) reported more than forty hours of work for any week, he was paid not less than time and a half for the hours reported as in excess of forty hours for said week; and on and after May, 1943, and at some stations before said date, whenever any head works tender (including any and all plaintiffs employed in that capacity) reported more than eight hours of work for any one day, he was paid not less than time and a half for the time in excess of eight hours for said day, regardless of whether his weekly report showed work in excess of forty hours per week.

(H) That the employment of each plaintiff listed as a hydro station attendant and each hydro station apprentice attendant, other than at a three-shift station, was similar to the employment of substation operators and attendants at substations other than three-shift stations; that is to say, each hydro station attendant and apprentice attendant, including each plaintiff employed in that capacity, was paid a monthly salary, which was paid semimonthly, and it was agreed between each said hydro station attendant,

including each plaintiff employed in that capacity, and the defendant, that said salary should be in full payment for all normal services of each said hydro station attendant, whether active or inactive. That at other than three-shift stations, there were no regular [212] scheduled hours of work, but that their active duties ordinarily would not require eight hours of active work, and that it was agreed between each plaintiff and the defendant that in evaluating his employment as a whole it was the equivalent of not more than eight hours of active service. That each said hydro station attendant and apprentice attendant employed in that capacity, including each plaintiff employed in that capacity, was required by the defendant to live on the property of the defendant for five days each week, in a house located near the powerhouse; and during certain days of the week, not exceeding five, and at many stations less than five, when not engaged in any active duty was required to remain so close to the station house or his residence as to be able to hear an alarm bell in case his services were needed in case of an emergency, in order to be able to render necessary services at any time in case of an emergency; that each such resident hydro station attendant had the privilege of having his family live with him. Defendant is informed and believes, and therefore alleges, that each and all of said hydro station operators having any family availed themselves of said privilege; that if there were any cases in which a hydro station operator did not do so, it was because for personal reasons he did not desire to have his family or some particular member of it reside with him. Defendant further alleges that during the time he was not required to perform any active service, each plaintiff could engage in any activity he pleased which on certain days, as aforesaid, would not take him beyond such distance from his residence and the power-

house so as to prevent him from hearing a signal requiring emergency service.

In this connection, defendant alleges that at its hydro stations at Borel and Kern River No. 1, the operators had scheduled eight-hour shifts, but said stations were not three-shift stations as defined in Subparagraph "(D)" hereof, in this: that after the shift, one of the operators was required to remain close enough to the station or to his residence to hear an alarm in case of an [213] emergency; that such duty was divided between the operators at said station so that such duty after their shift was required of them less than five days per week. Defendant further alleges that the plaintiff M. H. Huntington was employed for a portion of the time subsequent to March 19, 1942, at Borel and also at Kern River Station No. 1, but that none of the other plaintiffs were employed at said stations, or either of them, or at any three-shift stations, as defined in subparagraph "(D)" hereof.

(I) That at all times mentioned in said Third Amended Complaint, each hydro station attendant and apprentice attendant has made his own time report. That on such time report there is a space for showing overtime. That prior to and ever since March 19, 1942, each hydro station attendant and apprentice attendant (including the plaintiffs employed in said capacities), notwithstanding the fact that his normal active duties would ordinarily be less than eight hours, reported not less than eight hours of work for any day which he reported as working, irrespective whether on that particular day he performed eight hours of active duty or not. That whenever the time reports of any of the hydro station attendants and apprentice attendants (including each and all of the plaintiffs employed in such capacities) showed more than forty hours

per week, he was paid not less than time and a half for work reported in excess of forty hours for said week; and on and after May, 1943, and at some stations before said date, whenever the time reports of any hydro station attendants or apprentice attendants (including each and all of the plaintiffs employed in such capacities) reported more than eight hours of work for any one day, he was paid not less than time and a half for the work reported in excess of eight hours per day, regardless of whether or not his weekly reports showed work in excess of forty hours for that week.

(J) That for the purpose of computing the overtime compensation, the hourly rate was figured in the same manner as for the said [214] substation operators and attendants as hereinbefore alleged; that said method of computing said hourly rate was that used as to all of its employees who were on a monthly salary, and was in accordance with the agreement between each said plaintiff and the defendant, as hereinbefore alleged; that considering the employment of each plaintiff as a whole, it was the equivalent of not more than eight hours of active service.

(K) Defendant alleges that during the period that the War Manpower Commission decreed a forty-eight-hour week for the industry in Southern California, defendant at various and different times required its operating employees in its several departments to work six days a week instead of five, and that each and all of its said operating employees, including each and all of the plaintiffs who were then in its employ, did work the sixth day without any objection thereto, and without any claim that they were already working more than forty hours per week. Defendant further alleges that for the sixth day, it paid said operating employees, including all of the plaintiffs then in

its employ, not less than time and a half for eight hours of work, notwithstanding the fact that, as hereinbefore alleged, normally the active services of each of said plaintiffs on said sixth day would not equal eight hours of active service. Defendant alleges that none of the said plaintiff substation operators and attendants or relief operators and attendants then in its service, nor any of the plaintiff primary servicemen in its service, reported as overtime for the said sixth day more than eight hours of service, except where some one or more of said plaintiffs reported performing emergency service during the nighttime hours, as hereinbefore defined, and that none of the plaintiff head works tenders or hydro station attendants or apprentice attendants reported more than eight hours of overtime service for the said sixth day, solely because of a requirement not to leave the premises.

(L) Defendant specifically denies that it had any [215] agreement with any of the said plaintiffs as to services or compensation except as hereinbefore alleged, or that it at any time agreed to pay said plaintiffs or any of them for or on account of any activity of the said employees except as herein alleged, and denies that any of the plaintiffs herein, prior to joining in the above-entitled suit, at any time claimed that they were entitled to additional compensation to be paid for by this defendant or gave any indication whatsoever that the employment arrangements as aforesaid did not continue to be mutually acceptable to them.

(M) Defendant alleges that because of the facts hereinbefore alleged, the proper evaluation of the employment of each of its said resident employees, to wit: substation operators and attendants and relief operators and attendants, including each of the plaintiffs employed in that ca-

capacity; head works tenders, including each of the said plaintiffs employed in that capacity; and hydro station attendants and apprentice attendants, including each of the plaintiffs employed in that capacity, was the equivalent of not more than eight hours of active service, and that the agreement between each of said employees, including each of said plaintiffs herein, as hereinbefore alleged, was a reasonable and proper agreement.

IV.

Specifically answering Paragraph VI of said first alleged cause of action in said complaint contained, defendant alleges that its records show that during the periods hereinafter alleged, each of the plaintiffs was absent on military leave during the periods hereinafter alleged, but defendant has no knowledge or information as to whether they were actually in service during the times that they were on military leave. Basing its answer upon its records and defendant's lack of knowledge as to what the plaintiffs did during the periods of their leaves, defendant admits and alleges as follows:

(A) That Lloyd H. Bell was absent from the service of the [216] defendant on military leave from October 6, 1942, to March 29, 1943, inclusive; but for lack of knowledge, information and belief denies that during any of said time the said plaintiff was in military service.

(B) That the plaintiff Herbert S. Kaneen was absent from the service of the defendant on military leave from June 23, 1945, to March 31, 1946, inclusive; but for lack of knowledge, information and belief denies that during any of said time the said plaintiff was in military service. Defendant further alleges that the said plaintiff was one

of the original plaintiffs to this suit filed on or about the 19th of March, 1945.

(C) That plaintiff Lawrence E. Jackson was absent from defendant's service on military leave from December 7, 1943, to February 13, 1944, inclusive; but for lack of knowledge, information and belief denies that during any of said time the said plaintiff was in military service.

(D) That plaintiff Paul W. Cockrell was absent from the service of the defendant on military leave from October 29, 1943, to December 17, 1945, inclusive; but for lack of knowledge, information and belief denies that during any of said time after leaving defendant's service the said plaintiff was in military service. Defendant alleges that said Paul W. Cockrell intervened in this suit on May 1, 1945.

(E) That plaintiff Myron E. Glenn was absent from the service of the defendant on Military leave from July 11, 1944, to March 10, 1946, inclusive; but for lack of knowledge, information and belief denies that during any of said time the said plaintiff was in military service. Defendant further alleges that the said plaintiff was one of the original plaintiffs to this suit filed on or about the 19th of March, 1945.

V.

(A) Specifically answering Paragraph VII of the said first [217] alleged cause of action in said complaint contained, defendant specifically denies that the defendant has employed any of the said plaintiffs herein at any of the times alleged in said paragraph in excess of forty hours per week without paying the said plaintiff at least time and a half therefor.

(B) Further answering said paragraph, defendant admits that it has records showing the hours of work of its various employees, including the plaintiffs, and alleges that such records consist of and are based upon time reports; that the time reports of each plaintiff have been made out and turned in by each said plaintiff, each said time report constituting the representations by each plaintiff making it out as to the time worked by said plaintiff. In this connection the defendant alleges that each and all of its employees of the classes involved in this suit, including each and all of the plaintiffs, made out their own time reports, and that on each time report was a space furnished for overtime. That notwithstanding the facts heretofore alleged, each and all and every employee of the classes involved in this suit, including each and all of the plaintiffs, at all times, that is to say, prior to and after March 19, 1942, to the date hereof, in making out their time reports have customarily reported eight hours of normal duty, irrespective of whether they performed eight hours of active duty, for each and every day which they reported as working; and each and all of the substation operators and attendants and relief operators and attendants, including the plaintiffs employed in that capacity, and each and all of the primary servicemen, including each and all of the plaintiffs employed in that capacity, have reported in the space provided for overtime no overtime except for emergency services performed during the nighttime hours, as said terms have heretofore been defined; that the said hydro station attendants and apprentice attendants and head works tenders, including the plaintiffs employed in such capacity, reported no overtime [218] except where, in unusual emergency cases, they performed more than eight hours of active service per

day. During the time that each and all of the said employees of said classes, including the plaintiffs employed in those classes, were required to work six days per week, they reported for the sixth day eight hours of normal time; and the said substation operators and attendants, and the relief operators and attendants, including the plaintiffs employed in that capacity; and primary servicemen, including the plaintiffs employed in that capacity, made no report for overtime on the sixth day except for emergency service performed during the nighttime hours, as said terms have heretofore been defined; and the said hydro station attendants and apprentice attendants and head works tenders, including the plaintiffs employed in such capacities, reported no overtime for said sixth day except in the event that due to unusual emergency or extraordinary circumstances, they performed actually more than eight hours of active service on said sixth day. Defendant denies that any of its records show that there is any compensation due to the said plaintiffs, or any of them, or any other of its employees, whether for overtime or otherwise, other than current compensation due on the next pay-day. Defendant denies that it employed the said plaintiffs or any of them more than forty hours per week without paying them at least time and one half for the excess time that they were employed beyond forty hours per week. Denies that there is due, owing or unpaid from the defendant to the said plaintiffs, or any of them, compensation for any time for which they were employed in excess of the work-weeks established by said Act, or otherwise. Denies that there is any accounting due, or that any accounting should be required by said defendant to said plaintiffs, or to any other employee.

VI.

(A) Answering Paragraph VIII of said first alleged cause of action in said complaint contained, defendant admits that the [219] plaintiffs herein have employed David Sokol herein as their attorney, and that he is an attorney duly authorized to practice in the above-entitled court. Except as herein admitted, defendants deny the said Paragraph VIII and the whole thereof, generally and specifically, and each and every allegation therein contained.

(B) Further answering said Paragraph VIII of the first alleged cause of action in said complaint contained, defendant alleges that in not making any payments to the said plaintiffs herein for alleged overtime, it acted at all times in good faith and in a bona fide belief that in paying each said plaintiff the monthly salary agreed upon and the overtime for emergency services as hereinbefore alleged, it was complying with the law and was not violating any statute or contract or custom.

Answer to the Second Alleged Cause of Action

I.

Defendant here adopts, re-alleges, and repeats, with the same force and effect as though fully herein set forth at length, Paragraphs I, II, III, IV, V, and VI of its answer to the said first alleged cause of action.

II.

Said defendant, specifically answering Paragraph II, denies the said paragraph and the whole thereof, generally and specifically.

For a Second, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, defendant alleges:

I.

That as alleged in the first answer to the said first alleged cause of action, each and all of the plaintiffs herein were paid a monthly salary and no other compensation except the overtime payments as alleged and set out in Paragraph III of the said answer to the first alleged cause of action. Defendant [220] alleges that if the contract of employment were, as alleged by said plaintiffs in Paragraph IV of the said first alleged cause of action, based upon a stipulated monthly salary for forty hours of work per week, there was no contract to pay the said resident employees, that is to say, the plaintiffs employed as substation operators and attendants, and relief operators and attendants, and hydro station attendants and apprentice attendants any additional compensation whatever for being required to remain upon the Company's property or so close thereto as to be able to hear the alarm bell, and the head works tenders at or so close to their residences, as to be able to hear an alarm bell in case their services were needed for emergency work, nor was there any custom or practice to pay any of the said resident employees, to wit, said plaintiffs employed as substation operators and attendants, relief operators and attendants, hydro station attendants, and head works tenders, any compensation for their being required to remain, as aforesaid, either upon or so near the Company's property, or at or so near their residences, in the case of head works tenders, as to be able to hear an alarm bell, and that such activity on their part was not compensable by either contract or custom or practice at any of the said substations or hydro stations or places of employment of the said head works tenders, or at all. Defendant further alleges that, as averred in the said first answer

to the first alleged cause of action in said Third Amended Complaint, the plaintiffs employed as primary servicemen were employed to perform an eight-hour shift, and were paid a monthly salary therefor, and not less than time and a half for any emergency service performed in addition to their said eight-hour shift. That if the contract of employment were as alleged by said plaintiffs as aforesaid, and if the requirement of the defendant that in the event they left their residences after their shifts they advise the defendant of where they could be reached by telephone in case their services were required as an emergency, or in the case of the primary servicemen employed at Santa Paula that [221] during certain days of the week they take telephone complaints of customers directly on the telephone at their houses, amounted to any service at all, there was no contract between the defendant and any or either of said plaintiffs employed as primary servicemen to pay for such activity, nor was such activity paid for by the said defendant by custom or practice at any place of employment of any of said plaintiff primary servicemen, or at all.

For a Third, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, and by way of plea of estoppel:

I.

Defendant here re-adopts, repeats, and re-alleges Paragraph III of its first answer and defense as fully as though here set forth at length.

II.

Defendant alleges that at all times it relied in good faith upon the respective acts and representations and conduct of the plaintiffs as hereinbefore alleged in Para-

graph III of its first answer and defense, incorporated herein by reference; that so relying upon their acts and conduct, as hereinbefore stated, defendant believed in good faith that it was paying each and all of the said plaintiffs herein all the compensation which was due them under their contracts of employment and under any applicable laws, and that the employment arrangement continued to be satisfactory and acceptable to the said plaintiffs and that it was not incurring any penalties or liabilities whatever, and defendant based its tax reports to the United States Government and to the State of California upon the belief that it had no contingent or other liabilities, to any of said plaintiffs because of or on account of their employment, or at all. [222]

III.

Defendant alleges that if any of the said plaintiffs herein at any time prior to the institution of said suit had made or advanced the claims they are now asserting for overtime compensation, defendant, notwithstanding its belief that at all times it was complying with the law, would have taken steps to avoid the possibility of incurring further liability if plaintiffs' claims should be sustained, either by placing the various substations and hydro stations upon a three-shift basis as it did as soon as possible after the institution of this suit, or by taking such other appropriate steps as might then have seemed advisable to it.

IV.

Defendant alleges that it would be inequitable and unfair to permit the said plaintiffs, or any of them, to now claim or assert that they, or any of them, and the defendant did not agree that considering the active and inactive

duties of each plaintiff, the evaluation of his employment as a whole was not more than the equivalent of eight hours of active service, or that the said agreement was not a reasonable or proper agreement, or one in conformity with the facts and law, and said plaintiffs, or any of them, ought not now to be heard to claim or assert, and all of the plaintiffs are, and each is, estopped to claim or assert that they did not make the said agreement with the defendant as hereinbefore alleged, or that the said agreement was not reasonable and fair, and in conformity with the facts and law. [223]

For a Fourth, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, defendant alleges:

I.

Defendant here adopts, re-alleges, and repeats, with the same force and effect as though fully herein set forth at length, Paragraph III of its first answer to the said first alleged cause of action.

II.

That in the employment of each plaintiff herein in the various occupations as hereinbefore alleged, and under the arrangements and agreements as hereinbefore set out, in making the monthly payments to each said plaintiff as hereinbefore allaged, plus the overtime for emergency services as hereinbefore defined, and in omitting to make any additional or other payments, the said defendant herein acted in good faith and in the belief that it was fully complying with the provisions both of its contracts and agreements with said employees and with the said Fair Labor Standards Act, and that it acted in conformity with and in reliance upon administrative regula-

tions, orders, rulings, approvals, and interpretations, and administrative practices and enforcement policies of the Wage and Hour Administrator, the War Labor Board, and the War Manpower Commission with respect to the class of employers to which defendant belonged.

III.

That in July of 1939, the Wage and Hour Administrator issued Interpretative Bulletin No. 13, said bulletin being revised in October, 1939; in October, 1940; and in November, 1940. That as originally issued and as so revised, the sixth, seventh and eighth paragraphs thereof read and provided at all times after [224] its promulgation as follows:

“6. In a few occupations periods of inactivity need not be considered as hours worked even though the employee is subject to call. The answer will generally depend upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work—i.e., the frequency with which the employee is called upon to engage in work. In these cases, the nature of the employee’s work involves long periods of inactivity which the employee may use for uninterrupted sleep, to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small telephone exchange operating a switchboard located in the employee’s house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes

to make a telephone call. The operator has her bed alongside the switchboard and is able to get several hours of uninterrupted sleep every night, as experience over a considerable period of time may often demonstrate. Thus, if, over a period of several months, a telephone operator has been called upon to answer only a few calls between the hours of twelve and five in the morning, a segregation of such hours worked will probably be justified.

“7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well [225] often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians or watchmen of lumber camps, during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day. In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his meals and has a certain amount of time for relaxation and entirely private pursuits. In some cases the employee may be free to come and go during certain periods. Thus, here

again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in this situation will be accepted by the Division.

"8. In some cases employees may be subject to call after the completion of their regular working day; employees may be called upon after regular working hours to furnish emergency service to customers. If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered hours worked. If, on the other hand, the employee is merely required to leave word where he can be reached in the event of a call and [226] is not tied down to any particular place, such time need not ordinarily be considered hours worked. The employee, however, should be considered as working at any time during which he is actually making a call and his hours worked would include all time traveling to and from such a call."

IV.

(A) That the Pacific Gas and Electric Company maintains and operates a plant for the generation, purchase, sale and distribution of electrical energy in Northern California and as such is an employer of the class to which defendant belonged.

(B) That in generating electricity, it employed head works tenders and hydro station attendants and relief attendants, and that it maintained substations for the distribution of its electricity and employed and maintained therein substation operators and attendants and relief

operators and attendants. Defendant on its information and belief alleges that the employment and conditions of employment of said head works tenders, hydro station attendants, and substation attendants was substantially the same as the employment of the same classes of employees by the defendant herein. Defendant, on its information and belief, alleges that each and all of said employees were paid by the said Pacific Gas and Electric Company a monthly salary, which was understood and agreed between said company and each of said employees to be in full for all of the services, active and inactive, performed by said employees. Defendant is further informed and believes, and therefore alleges, that said Pacific Gas and Electric Company pays each of its said employees for certain overtime for emergency active services performed by them similar to the practice of the defendant as hereinbefore set forth, and that the terms and conditions of work and employment of each class of resident employees of Pacific Gas and Electric Company was substantially the same as the terms and conditions of work [227] and employment of each class of resident employees of Pacific Gas and Electric Company was substantially the same as the terms and conditions of work and employment of the same class of plaintiff employees of the defendant herein.

(C) Defendant further alleges on its information and belief that the Utility Workers Organization Committee of the C.I.O., for and on behalf of said employees and many other classes of employees of the said Pacific Gas and Electric Company in 1943 demanded increased wages from the said Pacific Gas and Electric Company, and

after negotiating with the said company made application to the National War Labor Board for increases. That the said National War Labor Board appointed a mediation panel to hear evidence and make recommendations thereof. That the report to the said National War Labor Board by the said mediation panel as to resident employees, which included substation operators and attendants, hydro station attendants, and head works tenders, set up the Union's position and the Company's position as follows:

“(b) Premium Pay for Resident Employees

“The union requested that a premium of 25 per cent be paid to resident employees to compensate them for being available at their place of employment 24 hours a day.

“Union's Position—The union claims that 24 hours per day of a resident employee's time belong to the company; that the union slogan of ‘Eight hours for work, eight hours for sleep, eight hours for what you will,’ has no meaning for these employees; that they are as much confined to the premises as inmates of the county prison farm and that, since they are so distinctly at a disadvantage as compared to ordinary employees, they should receive some additional compensation.

“Company's Position—The company maintains that such employees receive compensation for more [228] hours than they actually work and that an additional premium is not justified. Resident employees live at or near the place of employment usually in a dwelling furnished by the company. They perform

routine duties which do not require sustained effort. The principal requirement is that the employee be available to necessary telephone calls and to perform switching as directed. They may leave the premises by arranging for a substitute. They do not work under direct supervision. They prepare their own time cards. While not actually engaged in duties for the company they are free to engage in entirely personal pursuits. They have a five-day week. They are paid for 40 hours per week but under normal conditions never work more than 30. They are compensated at one and one-half times the regular rate of pay for hours worked in excess of 40. Since they receive 40 hours' pay for 30 hours' work, they already have a premium of 30 per cent in actuality. To demand premium payments in such case would be to take undue advantage of the necessity of maintaining 24-hour service for the public. The company claims that the National War Labor Board does not sanction payment for non-work; that the situation of a resident attendant is not one of hardship and such jobs are greatly desired; and that the Wage and Hour Division of the Department of Labor has considered the case of such employees and determined that only the hours spent in work need be compensable."

That the recommendation of said panel was as follows: [229]

"3. Resident Employees

"The panel unanimously recommends that no change be directed in the matter of the wages of resident employees.

We were impressed with the fact that they are now receiving 40 hours' pay for 30 hours' work and time and one half for overtime; that they are their own timekeepers; and that they have considerable free time for their own pursuits.

We recognize that they are more or less limited in their coming and going and that in certain surroundings such limitations can be very irksome.

But balancing the values and the disvalues of the present arrangement we do not believe that undue hardships are involved."

That said report of the panel was made on or about the 8th day of July, 1943. That on or about the 28th day of September, 1943, by virtue of and pursuant to the powers vested in it by Executive Order No. 9017 of January 12, 1942, the Executive Orders, directives, and regulations issued October 2, 1942, and the War Labor Disputes Act of June 25, 1943, the National War Labor Board made and issued its order with reference to all the matters in dispute, and in said order adopted the recommendation of the said panel as to resident employees, a portion of said order reading as follows:

"3. The union's request for premium pay for resident employees of the company is denied."

(D) Defendant on its information and belief alleges that since the situation of the resident employees of the said Pacific Gas and Electric Company so far as hours and conditions of work and [230] method of payment was in all respects substantially the same as the hours and conditions of work and method of payment of such plaintiffs herein, this defendant at all times in good faith

believed that said order as to resident employees of the War Labor Board was equally applicable to it and to each and all of such plaintiffs involved herein, and to all other employees performing the said services of such plaintiffs herein, and relied on said order.

V.

That shortly after the effective date of the Fair Labor Standards Act, the Administrator of the Act set up a regional office in Southern California, and, commencing sometime in 1939 and continuing thereafter, the books and pay-roll records of this defendant were inspected and the Company's compliance was investigated from time to time by representatives of said office, and the said regional office of the Administrator did not at any time inform this defendant that it was in any way violating the Fair Labor Standards Act; but, on the contrary, from time to time the representatives of said Administrator informed defendant that it was operating in strict compliance with the said Act, and on or about the 5th of July, 1941, the said defendant, through its executive Vice-President, Mr. Mullendore, was publicly advised by the Southern California Manager of the Wage and Hour Division of the United States Department of Labor that defendant was one whose records had been inspected and had been found to be operating in "complete compliance with the Act."

VI.

That at no time since the effective date of the Fair Labor Standards Act has the Administrator or any representative of the administrator or the War Labor Board, or any other governmental agency, made any complaint that the defendant was in any way violating the said Fair

Labor Standards Act in its employment and payment to the plaintiffs herein and other of its employees in the same classes [231] of employment as the said plaintiffs herein.

VII.

Defendant alleges that at all times it relied in good faith upon each and all of the aforesaid actions, rulings, and interpretations of the said administrative agencies of the Government of the United States.

For a Fifth, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, defendant alleges:

I.

That any award of liquidated damages against the defendant as prayed for in said Third Amended Complaint will operate to deprive the defendant of its property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States of America.

For a Sixth, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, and by way of plea of the statute of limitations, defendant alleges:

I.

That said action is barred so far as any liquidated damages are concerned under Subdivision 1 of Section 340 of the Code of Civil Procedure of the State of California for any services performed or rendered prior to

March 22, 1944, by the plaintiffs Howard L. Anderson, Eugene L. Ellingford, Myron E. Glenn, Herbert Kaneen, B. E. Moses, Charles Stanley Myrenius and Vernon V. B. Wert, [232] or any of them; for any services performed or rendered prior to May 1, 1944, by the plaintiffs C. C. Blenis, J. D. Borden, Harold A. Boynton, Paul W. Cockrell, W. H. Culbertson, E. G. Eggers, C. E. Foster, C. R. Frazier, F. E. Griffes, J. A. Henle, A. L. Honnell, Lawrence E. Jackson, Verner Neher, C. C. Prinslow, M. E. Roach, Clarence Rogers, John M. Smith, E. N. Sweitzer, or any of them; and for any services performed or rendered prior to June 19, 1944, by the plaintiffs Andy G. Austin, W. B. Burton, E. E. Dickerson, Oathy G. Horne, L. S. Morgan, L. A. Phinney, Marion S. Poston and Archie Tregoning, or any of them; for any services performed or rendered prior to July 11, 1944, by the plaintiff Lawrence G. Hagerman; for any services performed or rendered prior to September 10, 1944, by the plaintiffs Merle M. Edgerton, P. G. Hanlon, L. W. Heinig, W. S. Hostetler and L. F. Hudson, or any of them; for any services performed or rendered prior to October 9, 1944, by the plaintiffs Floyd E. Downs, William E. Hogg, G. F. Larsen, Paul L. Lowery, Thomas E. Osborne and G. W. Stark, or any of them; for any services performed or rendered prior to October 22, 1944, by the plaintiff Frank Johnson; for any services performed or rendered prior to October 29, 1944, by the plaintiffs Robert C. Green and F. E. McClanahan, or either of them; for any services performed or rendered prior to November 21,

1944, by the plaintiffs Sidney H. LaFond and F. D. Schwalbe, or either of them; for any services performed or rendered prior to November 30, 1944, by the plaintiff Harlan E. Mayes; for any services performed or rendered prior to December 10, 1944, by the plaintiff Arthur E. Fontaine; for any services performed or rendered prior to January 18, 1945, by the plaintiffs Rudolph C. Greiner, Monroe H. Huntington, and Edward M. Kirste, or any of them; for any services performed or rendered prior to January 31, 1945, by the plaintiff H. J. Krekeler; for any services performed or rendered prior to March 21, 1945, by the [233] plaintiffs G. H. Bartholomew, Merle Bartholomew, Lloyd H. Bell, J. J. Bryan, Roye E. Johnson, J. W. McKernan, A. L. Neff, Fred C. Ray, Richard W. Rodenbeck, James C. Schrader, Harold A. Trunnell and George C. Wooldridge, or any of them.

For a Seventh, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, and by way of plea of the statute of limitations, defendant alleges:

I.

That under Subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California, the action is barred for any services performed or rendered prior to March 19, 1943, by the plaintiffs Howard L. Anderson, Eugene L. Ellingford, Myron E. Glenn, Herbert S. Kaneen, B. E. Moses, Charles Stanley Myrenius and Vernon V. B. Wert, or any of them; for any services

performed or rendered prior to May 1, 1943, by the plaintiffs C. C. Blenis, J. D. Borden, Harold A. Boynton, Paul W. Cockrell, W. H. Culbertson, E. G. Eggers, C. E. Foster, C. R. Frazier, F. E. Griffes, J. A. Henle, A. L. Honnell, Lawrence E. Jackson, Verner Neher, C. C. Prinslow, M. E. Roach, Clarence Rogers, John M. Smith, E. N. Sweitzer, or any of them; for any services performed or rendered prior to June 19, 1943, by the plaintiffs Andy G. Austin, W. B. Burton, E. E. Dickerson, Oathy G. Horne, L. S. Morgan, L. A. Phinney, Marion S. Poston and Archie Tregoning, or any of them; for any services performed or rendered prior to July 11, 1943, by the plaintiff Lawrence G. Hagerman; for any services performed or rendered prior to September 10, 1943, by the plaintiffs Merle M. Edgerton, P. G. Hanlon, L. W. Heinig, W. S. Hostetler and L. F. Hudson, or any of them; for any services performed or rendered prior to October 9, 1943, by the plaintiffs Floyd E. Downs, William E. Hogg, G. F. Larsen, Paul L. [234] Lowery, Thomas E. Osborne and G. W. Stark, or any of them; for any services performed or rendered prior to October 22, 1943, by the plaintiff Frank Johnson; for any services performed or rendered prior to October 29, 1943, by the plaintiffs Robert C. Green and F. E. McClanahan, or either of them; for any services performed or rendered prior to November 21, 1943, by the plaintiffs Sidney H. LaFond and F. D. Schwalbe, or either of them; for any services performed or rendered prior to November 30, 1943, by the plaintiff Harlan E. Mayes; for any services

performed or rendered prior to December 10, 1943, by the plaintiff Arthur E. Fontaine for any services performed or rendered prior to January 18, 1944, by the plaintiffs Rudolph C. Greiner, Monroe H. Huntington and Edward M. Kirste, or any of them; for any services performed or rendered prior to January 31, 1944, by the plaintiff H. J. Krekeler; for any services performed or rendered prior to March 21, 1944, by the plaintiffs G. H. Bartholomew, Merle Bartholomew, Loyd H. Bell, J. J. Bryan, Roye E. Johnson, J. W. McKernan, A. L. Neff, Fred C. Ray, Richard W. Rodenbeck, James C. Schrader, Harold A. Trunnell and George C. Wooldridge, or any of them.

For an Eighth, Further, Separate, Distinct Answer and Defense to said complaint, and to each and both causes of action therein contained, and by way of plea of the statute of limitations, defendant alleges:

I.

That under Subdivision 1 of Section 338 of the Code of Civil Procedure of the State of California, the action is barred for any services performed or rendered prior to March 19, 1942, by the plaintiffs Howard L. Anderson, Eugene L. Ellingford, Myron E. Glenn, Herbert S. Kaneen, B. E. Moses, Charles Stanley Myrenius and Vernon V. B. [235] Wert, or any of them; for any services performed or rendered prior to May 1, 1942, by the plaintiffs C. C. Blenis, J. D. Borden, Harold A. Boynton, Paul W. Cockrell, W. H. Culbertson, E. G. Eggers, C. E. Foster, C. R. Frazier, F. E. Griffes, J. A.

Henle, A. L. Honnell, Lawrence E. Jackson, Verner Neher, C. C. Prinslow, M. E. Roach, Clarence Rogers, John M. Smith and E. N. Sweitzer, or any of them; for any services performed or rendered prior to June 19, 1942, by the plaintiffs Andy G. Austin, W. B. Burton, E. E. Dickerson, Oathy G. Horne, L. S. Morgan, L. A. Phinney, Marion S. Poston and Archie Tregoning, or any of them; for any services performed or rendered prior to July 11, 1942, by the plaintiff Lawrence G. Hagerman; for any services performed or rendered prior to September 10, 1942, by the plaintiffs Merle M. Edgerton, P. G. Hanlon, L. W. Heinig, W. S. Hostetler and L. F. Hudson, or any of them; for any services performed or rendered prior to October 9, 1942, by the plaintiffs Floyd E. Downs, William E. Hogg, G. F. Larsen, Paul L. Lowery, Thomas E. Osborne and G. W. Stark, or any of them; for any services performed or rendered prior to October 22, 1942, by the plaintiff Frank Johnson; for any services performed or rendered prior to October 29, 1942, by the plaintiffs Robert C. Green and F. E. McClanahan, or either of them; for any services performed or rendered prior to November 21, 1942, by the plaintiffs Sidney H. LaFond and F. D. Schwalbe, or either of them; for any services performed or rendered prior to November 30, 1942, by the plaintiff Harlan E. Mayes; for any services performed or rendered prior to December 10, 1942, by the plaintiff Arthur E. Fontaine; for any services performed or rendered prior to January 18, 1943, by the plaintiffs Randolph C. Greiner, Monroe

H. Huntington, and Edward M. Kirste, or any of them; for any services performed or rendered prior to January 31, 1943, by the plaintiff H. J. Krekeler; for any services performed or rendered prior to March 21, 1943, by the plaintiffs [236] G. H. Bartholomew, Merle Bartholomew, Loyd H. Bell, J. J. Bryan, Roye E. Johnson, J. W. McKernan, A. L. Neff, Fred C. Ray, Richard W. Rodenbeck, James C. Schrader, Harold A. Trunnell and George C. Wooldridge, or any of them.

Wherefore, defendant prays that plaintiffs take nothing by this action; for its costs of suit herein, and for such other and further relief as to the court may seem just in the premises.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for defendant Southern California
Edison Company, Ltd.

Received copy of the within Answer to Third Amended Complaint this 29 day of September, 1947. David Sokol (SJF), Attorney for Plaintiffs.

[Endorsed]: Filed Sep. 29, 1947. Edmund L. Smith,
Clerk. [238]

[Title of District Court and Cause]

AFFIDAVITS ON BEHALF OF THE DEFEND-
ANT IN OPPOSITION TO THE MOTION OF
PLAINTIFFS FOR PARTIAL SUMMARY
JUDGMENT

Affidavits of: G. E. Moran, C. R. Clark, R. E. Rice,
J. G. Winkelpleck, William H. Short, J. D. Garrison,
C. E. Pichler, R. G. Kenyon, William C. Mullendore. [239]

[Title of District Court and Cause]

AFFIDAVIT OF G. E. MORAN IN OPPOSITION
TO MOTION FOR PARTIAL SUMMARY
JUDGMENT

State of California

County of Los Angeles—ss.

G. E. Moran, being first duly sworn, deposes and says:

That he is a citizen and resident of the County of Los Angeles, State of California, and has been employed by the defendant in the action above entitled as superintendent of substations; that he has been such superintendent since January 25, 1945, and prior thereto was assistant superintendent of substations from January 1, 1941 to January 25, 1945. That affiant has read the answer of the defendant to the third amended complaint which is served and filed contemporaneously herewith, and has also read the affidavits filed by the plaintiffs in support of the motion for summary judgment [240] and the affidavits of J. D. Garrison and W. H. Short, served and filed contemporaneously herewith.

Affiant says that as superintendent of substations, and prior thereto as assistant superintendent of substations, he was required to be, and was and is familiar with the operation of such substations and with the services required of the substation operators. Affiant states that in speaking of substation operators and relief operators he will not refer to operators or relief operators working at what is commonly known as three-shift stations, that is to say, stations where the operators work on scheduled eight hour shifts and at the end of each shift are free to go wherever they please and do whatever they wish; that there are stations where three operators are employed and where there are no regular scheduled hours of work, and for that reason such stations are not included in the term "three shift stations," and that in this affidavit affiant will deal solely with the one, two and three man stations where there were no scheduled hours of work. The large majority of stations involved in this litigation were one man stations.

Affiant denies unequivocally that there was any contract of employment with any of the said plaintiffs of the character alleged in the first alleged cause of action set out in the third amended complaint. Affiant states that the employment of each said substation operator and attendant and each relief operator and attendant was made generally in the manner set out in the affidavits of J. D. Garrison and W. H. Short served and filed contemporaneously herewith, and that the contract of employment between each of the said substation operators and attendants and relief operators and attendants and the defendant was as set out in the answer of the defendant to the said third amended complaint contemporaneously served and filed herewith.

Affiant states that in addition to the substation relief [241] operators and attendants employed by the defendant in the manner set out in the affidavits of W. H. Short and J. D. Garrison contemporaneously served and filed herewith, there were quite often employees of the Company in other departments who were transferred from those departments to substations. Such transfers were sometimes made at the suggestion of the Company because, in the judgment of the foreman or superintendent of the employee, the work which he was doing had, because of his age, infirmities, or other cause, become too strenuous for him, and it was felt that he should be given a lighter duty job; in other instances, the transfer was made at the request of the employee himself. Affiant states that the plaintiff L. S. Morgan is an example of an employee being given a substation operator's job because of inability to perform more strenuous service. Originally he was a groundman, and the work of that position becoming too heavy for him, he was transferred to the position of a watchman, and from watchman to substation relief operator and attendant.

Affiant denies unequivocally that there was any agreement whatever to pay plaintiffs additional compensation in any sum or amount, or at the rate of one and one-half times the regular hourly rate for any work in excess of forty hours per week, or any agreement to pay overtime whatever, except for active emergency services performed during the night time hours as said terms are defined in the answer to the third amended complaint. Affiant denies specifically and categorically that there was any custom or practice in effect as alleged in Paragraph II of the second alleged cause of action in the third amended complaint contained. On the contrary, affiant states that the

only custom and practice was to pay the compensation in the manner set out in the answer to the third amended complaint and in the affidavits of said J. D. Garrison and W. H. Short; that none of said plaintiffs, or any other substation operator or relief operator has ever been paid anything other than the [242] monthly salary agreed upon and overtime for active emergency services which he reported rendering during the night time hours, as emergency service and night time hours are defined in the answer to the third amended complaint.

Affiant states that the duties of a relief operator are the same as those of a substation operator, the only difference being that the relief operator moves from station to station to relieve the regular operator at such stations, but that while relieving the operator of the station his duties are substantially the same as those of the resident operator; that there are housekeeping quarters at or near each said substation where the relief operator lives, but in moving from place to place, the relief operator is usually not accompanied by, and does not live there with, the members of his family.

Affiant states that the duties of the substation operators are very light; that they are as set out in the third answer to the interrogatories heretofore propounded by plaintiffs, and that as therein stated the duties are to inspect the station daily, to report to the switching center, to take instrument and battery readings and record the same; to perform routine and emergency switching of power lines in accordance with telephoned orders from the switching center and the written instructions; to keep the station and the cottage in which the attendant lives in order, and also to maintain the lawns and grounds. In addition to the above duties, the substation operator and attendant,

usually not oftener than once a month, and sometimes less frequently than that, makes routine trip tests; that the affidavits of the plaintiffs filed in support of their motion indicates that the routine trip tests are a daily part of their occupation. Affiant says that is not so, and they are normally not made oftener than once a month and frequently not that often. Affiant states that normal trip testing will require [243] from three to five hours, but there have been times when it will require as much as six to eight hours; however, to take more than four or five hours is unusual.

Affiant states that in the majority of its substations, the operators were not required to take outside telephone calls, and there was no outside telephone in his residence; that at certain stations the substation operator was expected to take outside telephone calls as a part of his regular duties.

Affiant states that he has no way of knowing whether or not the statement in the affidavit filed by plaintiffs is correct that the operators would average 400 calls per month, but doubts if, at the average station, calls would amount to anywhere near that number.

Affiant states that nothing was paid for time given for taking such calls received at times other than those designated in the answer to the third amended complaint as the night time hours; but that for calls received during the period defined in the answer as night time hours the substation operators and attendants have been paid for such time, but have not usually recorded the same on their daily time reports, being allowed to accumulate such time during the week and give an estimate of their accumulated time on their weekly time reports.

Affiant further states that so far as turning on street lights is concerned, that also is required at certain substations only. At certain periods of the year the lights are turned on before six o'clock p. m. in which case, of course, the operator is not allowed anything for time consumed. Where the lights have been turned on after six o'clock p. m., the substation operator and attendant has, since December 24, 1943, been allowed to make no report per day of that activity, but to accumulate the time and show it on his weekly time report. [244]

Affiant states that the Company has no way of knowing the amount of time consumed in taking outside telephone calls and in turning on street lights except from the time reports made out by the employees themselves.

The substation operators and attendants including all plaintiffs employed in that capacity lived in homes owned by the Company at or near the substation, for which they paid rent and paid for the utilities. Such homes were at all times freely accessible to any relatives, friends or other persons who might desire to visit with or contact the residents therein; that at substations where such homes were located within a fence, because of being adjacent to the substation which was fenced, that although no one was permitted to go into the substation building or switchyard except the operator or person authorized by the defendant, anyone was permitted to go to the home of the operator which was separately fenced or otherwise adequately separated from the substation and switchyard portions of the premises. At some substations the homes were in no way inclosed by fences and at some substations are located across the street from the substation. That the relief substation operators and attendants were furnished housekeeping quarters at each substation, which

were in the same enclosure as the resident operator's cottage, and were likewise available to and could be entered by any friends or relatives of the relief [245] operator and attendant, or any person desiring to visit him.

Affiant states that any resident operator and attendant or relief operator and attendant was privileged at any and all times to have friends and relatives visit him at his residence or relief quarters.

Affiant states that the following statement in the affidavit filed by plaintiffs in support of their motion for summary judgment is untrue:

"In case of illness, since the plaintiffs could not leave the premises, they were dependent upon physicians of the defendant who came to the premises in emergency." (Afft. p. 5, L. 16-18.)

Affiant states that the defendant does now, and at all times since March 19, 1942 and prior thereto has, maintained personnel from which relief could be provided to any plaintiff substation operator and attendant in case of illness or other emergency which might require the operator to leave the said premises. Affiant states that where a substation operator and attendant or relief operator and attendant reported that he was ill, and that he desired to leave his station on that account, that a relief operator and attendant would be sent from the relief personnel as quickly as possible; that if he requested a doctor to be sent to him without specifying any particular doctor, the defendant's doctor would naturally, and in the normal course, be sent to him; that if he desired another doctor than the defendant's physician, he was at liberty to call such other doctor himself or arrange to see him.

At some substations the attendant is required to answer telephone calls and report the same to the primary service men or the switching center, and at some substations they are also required to do switching to turn on street lights. Where this [246] switching occurs during what is denominated in the answer to the third amended complaint as "night time hours," they are allowed to, and do charge the time consumed as overtime.

The station grounds, lawns and shrubbery vary, so that it is impossible to say the precise amount of time required to maintain such grounds, as it would be more at one station than another. Aside from the work of maintaining the grounds and cottage, the other active duties of the station operator and attendant would not require normally more than two to three hours a day, and all of his duties, including keeping the grounds, station house and cottage in order, would occupy between two and five hours per day. During the remainder of the 24 hours, he is at liberty to do anything he pleases, engage in any activity he desires except that in the past he has been required to remain where he could hear a call in case he was needed for emergency switching.

The duties of the substation operator and attendant have always been generally considered among the easiest, if not the easiest, in the operations of the company.

At all times involved in this suit, such substation operators and attendants, and also the relief operators, have been paid a monthly salary, payable in semi-monthly installments.

While it is true that actually, a substation operator is occasionally called out of bed at night or in the early morning hours to perform emergency switching, and

there have been times when at some stations there have been quite a number of such call outs in a single night, or during a storm for several nights, affiant states upon his belief and knowledge of the operations of such substations that such interruptions on the whole are very unusual. Affiant is informed by counsel that there have been introduced in evidence schedules showing such call-outs as reflected by the overtime charged therefor by each such substation operator and attendant. Such schedules of course speak for themselves, but [247] affiant refers to them in support of his foregoing statements that on the whole, the call-outs during the night time hours are infrequent.

Affiant states as aforesaid, that at all times during his connection with the defendant, the substation operators and attendants have been paid a straight monthly salary; that such salary was paid to them for all the services they performed of every kind and nature, other than emergency services performed during night time hours, as said terms "emergency service" and "night time hours" are defined in the answer to the third amended complaint; and that at no time has there ever been any demand made by any substation operator and attendant, other than the filing of this suit and that of Raymond F. Drake, et al. v. Southern California Edison Company, Ltd., No. 5544WM in this court, for any additional or further compensation; that prior to and at all times subsequent to March 19, 1942, the defendant paid overtime for any services which the substation operators and attendants and relief operators and attendants performed in answering any call-outs during night time hours, as defined in the said answer to the third amended complaint.

That each substation operator and attendant and relief substation operator and attendant has, at all times involved herein, made out his own daily and weekly time report, and that on all such reports each and every operator and attendant and relief operator and attendant showed eight hours of normal time for each day notwithstanding the fact that normally, the active duties of such operator and attendant or relief operator and attendant would not require eight hours. Such fact was well known to the defendant and to each of said operators and attendants and relief operators and attendants; that none of said operators and attendants or relief operators and attendants had any scheduled hours whatever, or any time during the twenty-four in which to perform their services, except that at most substations, there were certain specified times at which they were required to call their switching center and to take periodic meter readings; and in the winter months at substations where they may turn on street lights at a specified time shortly prior to the commencement of night [248] time hours, as said term is defined in the answer to the third amended complaint, that the record of eight hours of normal time for each day's service could only be made by the substation operators and attendants and relief operators and attendants and accepted by the defendant on the basis that their job, that is, their active and inactive duties, was the equivalent of eight hours of active service.

Affiant further states that on each daily and weekly time report there was a space provided for entry of any

overtime, and that no substation operator or attendant or relief operator or attendant ever entered in any of said daily or weekly time reports any claim for overtime except for emergency services performed during the night time hours as defined in the answer to the third amended complaint; that when defendant advised its said substation operators and attendants and relief operators and attendants that because Southern California had been placed by War Manpower Commission upon a forty-eight hour week, they would be required to work for six days a week instead of five, and would be paid overtime for the sixth day, none of the substation operators and attendants or relief operators and attendants made any objection thereto, or claimed that they were then normally working more than forty hours per week, and during the time that they worked six days per week they reported on their daily and weekly time cards eight hours of normal time as overtime for the sixth day, unless they had been called upon to perform emergency service during the night time hours of said day, as said emergency service and night time hours are defined in the said answer to the third amended complaint.

That as superintendent of substations affiant has never heard or known of any claim being made, other than in this suit and the case of Raymond F. Drake, et al. v. Southern California Edison Company, Ltd., by any of the substation operators and attendants or relief operators and attendants that they were entitled to any [249] compensation over and above their monthly salary and such

overtime as they recorded on their said time reports. Affiant alleges that there are a great number of other substation operators and attendants employed by defendant under the same circumstances and conditions as these plaintiffs who have never made any claim for any additional compensation. Affiant states that to his best belief, the plaintiffs in this suit who are substation operators and attendants or relief operators and attendants comprise less than one-fifth of defendant's employees of that class from March 19, 1942 to this time, and that as aforesaid, none of the other employees not joining as parties have ever claimed or asserted that there is any compensation due them other than their monthly salary and the overtime recorded on their time reports, although affiant is informed and believes great efforts have been made to bring to their attention the claims asserted in this suit and to induce additional employees to join in this suit, including the following publication appearing in the November-December, 1945 issue of the I. B. E. W.-A. F. L. Utility News, Southern California Utility Employees Edition:

"Southern California Edison Company

This office has been asked on numerous occasions, the status of Edison employees who have not, to this date, signed up in the suit against the Southern California Edison Company for back pay, resulting from stand-by duty. Inasmuch as this case is handled by Mr. David Sokol, Attorney, for those employees who filed the suit, the questions were referred to him for

answer. The following is a letter received from Mr. Sokol:

International Brotherhood of

Electrical Workers

Local B-18

2316 West 7th Street [250]

Los Angeles, California

Attention: C. P. Hughes, Int'l. Rep.

Dear Sirs:

Pursuant to your inquiry, I am advising you that on July 23, 1945, the Hon. Ben Harrison, Judge of the U. S. District Court, sitting at Los Angeles, ruled in the case of Southern California Edison Company's sub-station operators, attendants, primary service-men and others, that only those employees who became parties to the action, could recover therein.

In other words, upon a judgment in favor of the plaintiffs, only those employees who are named in the suit will recover back pay in a double amount as required by the Act.

The company would not be required to pay anyone else.

Furthermore, those employees who delay in filing their claims, are sleeping on their rights and will lose back pay inasmuch as there is a statute of limitations of three years in which the action can be filed. Since our action was filed March 19, 1945, all persons in our suit will recover back to March 19, 1942.

However, if any one files a new suit at this time, separate and apart from our action, they would re-

cover as of this date from November 26, 1945, rather than March 19, 1942.

Very truly yours,

s/ David Sokol

DS:SJH

DAVID SOKOL

This office suggests that, in the future, all [251] employees who desire further information to contact Mr. David Sokol, 707 So. Hill Street, Los Angeles 14, California, direct by mail or in person as this case is out of the jurisdiction of Local B-18."

Affiant is informed and believes and therefore states, that the said publication is normally sent to each member of the union in good standing, and a large number of substation operators and attendants and relief operators and attendants now in the service, and who have been in defendant's service between the 19th of March, 1942 and the present time, have been and are members of the said union.

Further deponent saith not.

G. E. MORAN

Subscribed and sworn to before me this 24th day of September, 1947.

(Seal)

BARBARA ROWE

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires June 5, 1950.

[Endorsed]: Filed Sep. 29, 1947. Edmund L. Smith, Clerk. [252]

[Title of District Court and Cause]

AFFIDAVIT OF C. R. CLARK IN OPPOSITION
TO MOTION FOR PARTIAL SUMMARY
JUDGMENT

State of California
County of Ventura—ss.

C. R. Clark, being duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the County of Ventura, State of California, and has been employed by the Southern California Edison Company as an apprentice operator and substation attendant for eleven years and eleven months and in such capacity has worked at the following substations:

Carpenteria

Casitas

That affiant has read the Affidavit of G. E. Moran, which is served and filed contemporaneously herewith, and particularly the [253] portions thereof setting forth the duties of a substation operator and the times normally required to perform such duties and also the methods of compensating the employees for such duties.

Affiant states that each of the statements appearing in the said Affidavit of G. E. Moran relating to such duties, times and methods of pay are full, true and correct statements and are truly representative of the facts and of the experience of the affiant in such positions.

Further deponent sayeth not.

C. R. CLARK

Subscribed and sworn to before me this 24th day of September, 1947.

(Seal)

BARBARA ROWE

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires June 5, 1950.

[Endorsed]: Filed Sep. 29, 1947. Edmund L. Smith, Clerk. [254]

[Title of District Court and Cause]

AFFIDAVIT OF R. E. RICE IN OPPOSITION
TO MOTION FOR PARTIAL SUMMARY
JUDGMENT

State of California

County of Los Angeles—ss.

R. E. Rice, being duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the County of Los Angeles, State of California, and has been employed by the Southern California Edison Company as a relief operator, substation attendant, and operator for eleven years and two months and in such capacity has worked at the following substations:

Western Division—various stations

Casitas

That affiant has read the Affidavit of G. E. Moran, which [255] is served and filed contemporaneously herewith, and particularly the portions thereof setting forth the duties of a substation operator and the times normally

required to perform such duties and also the methods of compensating the employees for such duties.

Affiant states that each of the statements appearing in the said Affidavit of G. E. Moran relating to such duties, times and methods of pay are full, true and correct statements and are truly representative of the facts and of the experience of the affiant in such positions.

Further deponent sayeth not.

R. E. RICE

Subscribed and sworn to before me this 24th day of September, 1947.

(Seal)

BARBARA ROWE

Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed Sep. 29, 1947. Edmund L. Smith, Clerk. [256]

[Title of District Court and Cause]

AFFIDAVIT OF J. G. WINKELPLECK IN OP-
POSITION TO MOTION FOR PARTIAL
SUMMARY JUDGMENT

State of California

County of Los Angeles—ss.

J. G. Winkelpleck, being duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the County of Los Angeles, State of California, and has been employed by the Southern California Edison Company as an apprentice operator, substation attendant

and operator for six and one-half years, includes two years and two months' Military Leave, and in such capacity has worked at the following substations:

Coast Division—various stations

Macneil

Dalton. [257]

That affiant has read the Affidavit of G. E. Moran, which is served and filed contemporaneously herewith, and particularly the portions thereof setting forth the duties of a substation operator and the times normally required to perform such duties and also the methods of compensating the employees for such duties.

Affiant states that each of the statements appearing in the said Affidavit of G. E. Moran relating to such duties, times and methods of pay are full, true and correct statements and are truly representative of the facts and of the experience of the affiant in such positions.

Further deponent sayeth not.

J. G. WINKELPLECK

Subscribed and sworn to before me this 24th day of September, 1947.

(Seal)

BARBARA ROWE

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires June 5, 1950.

[Endorsed]: Filed Sep. 29, 1947. Edmund L. Smith, Clerk. [258]

[Title of District Court and Cause]

AFFIDAVIT OF WILLIAM H. SHORT IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT

State of California

County of Los Angeles—ss.

William H. Short, being first duly sworn, deposes and says:

I am now employed by the defendant and have been since February 18, 1919, when I first entered its employ. On January 1, 1938, I became Personnel Man, and thereafter was given the title of Personnel Supervisor and Superintendent of Personnel of the Operating Department.

Some time after 1940—I cannot state the exact time, but it may have been in 1941 or 1942—I was given the title of Supervisor of Employment over the entire Company. One of the duties of my office has been to interview applicants for employment by the Company. [259]

On March 19, 1942, and for some time prior thereto, and ever since, J. D. Garrison, whose affidavit is served and filed herewith, was my assistant and was the only assistant interviewing applicants whom I had in the department up to about a year or a year and a half ago. I have read the answer of the defendant to the third amended complaint herein.

From March 19, 1942, and for some time prior thereto, up to the present time, Mr. Garrison and I have interviewed all applicants for positions with the Company, with the exception of persons employed by managers, superintendents or foremen in the field in cases of emergency or for some other cause.

As stated, we added personnel to our department about a year or a year and a half ago, since which time some of the applicants have been interviewed by the other assistants. Prior to March 19, 1945, with the exception noted, all applicants were interviewed by either Mr. Garrison or me; I would say, however, that 85 to 90 percent of them were interviewed by Mr. Garrison.

More than 90 percent of all applicants coming to our department are interviewed for beginners' jobs, that is, the lowest bracket in any line of endeavor. Except for most persons who are applying for clerical jobs or office work, who usually have a definite position in mind, the average applicant simply comes in to find out if there is a job or position he can fill with the Company; in fact, I would say more than 90 percent of them seeking jobs outside of clerical or office work usually ask if people are being hired.

When a man asks such a question, either Mr. Garrison or I question him to see what experience or ability he had so as to determine whether he would fit in to any of the various operating departments of the Company. For example, if a man had no experience with electricity but had mechanical experience, we would talk to him about the jobs in the mechanical departments; or, if he had [260] been a chauffeur or truck driver, we would talk to him of some position involving the driving of trucks or other vehicles for the Company.

It not infrequently happens that a man has had experience or training that might fit him for more than one position. In that case, we discuss with him each of the said positions as fully as we can, describing the pay, his duties, the conditions and terms of work, and answer any and all questions that he may ask.

When we are discussing one or more positions with a man, we usually try to determine in which one of those he would be best satisfied, considering his previous experience and ability, and suggest that to him. He does not always follow the suggestion. If there happens to be a vacancy in any position which we think he would be qualified to fill he is asked to fill out an application, and we send him with the application to the head of the particular division where his services might be used. If there is no vacancy open in any of the lines in which we think he could be used by the Company and he is interested in one or more jobs for which we think he might be qualified, we ask him to make out an application which contains his address and telephone number, if he has one, and the application is filed. When a notification is received of an appropriate vacancy which we think the man could fill, we get in touch with him and request him to present himself for a further interview, at which time we review the position for which there is then a vacancy and explain to him the duties of that position, making sure that he understands the working conditions and salary of that particular job, and that he is agreeable to the salary and conditions. If so, he is then sent to the superintendent of the particular division and is interviewed by the superintendent or his assistant. If the superintendent or his assistant decides that the applicant is suitable, the applicant is sent back to the employment office with a direction to that effect. He is then sent with his application [261] to the medical department for medical examination. If he is not passed, the applicant is not employed. If he is passed by the medical department, he is given his application form to take with him to the department or division head, and is then instructed by his superintendent or foreman as to his duties, and put to

work. His application form is given to the clerk of the division, and is sent back by the clerk to the Comptroller's Office after it is approved by the necessary officers of the Company, and becomes a part of the Company's records.

There have been occasional cases where applicants have come in and asked definitely for a substation operator's job, or some other particular job. This has usually occurred where they have had friends working in some such position or where the applicant, from other causes, knows generally of the duties and pay of a particular job. That is very unusual, however, and as aforesaid, the large majority of applicants come in and ask if we are hiring people; this is true of the great majority of persons who have been employed for substations operators.

When an applicant is found to have had training or experience that might fit him for more than one position, we have customarily discussed with him the various positions for which we think he might be fitted, informing him of the pay for each position, the work, and the various conditions to enable him to compare the jobs and decide which, if any, he desires to apply for.

While I cannot now recollect having interviewed any one particular applicant who was finally employed as a substation operator and who had qualifications for more than one position, I know that during the course of years I have on several occasions discussed with a number of applicants ultimately employed as substation operators or relief operators and attendants, other positions for which I thought they either had training or experience. In doing [262] so, I explained the pay, and hours of work, and different working conditions of the various positions. Again, while I cannot specify any one certain person, I know there have been quite a number of times

where persons have been inclined to take one position and, after discussion, have taken another, usually because of our pointing out that we thought they were better qualified for the other position. I know there have been cases where men, who at first were inclined to apply for a position other than substation operator and attendant, who have, after discussion with Mr. Garrison or myself, eventually made application for that work for the reasons above stated, just as there have been instances where men who originally thought they would like to be substation operators and attendants have made application for another position which we thought they were better fitted for or because of some difference in working conditions.

When a man either applies for work as a substation attendant or, from our interviews, we have suggested that would be a job for which he could qualify, we then explain to him the duties of the job. I always told an applicant (and I know from overhearing conversations between applicants and Mr. Garrison that he has customarily told them) that he will commence as an apprentice operator, his first job being that of a relief operator and attendant; that for a short period he will serve under an experienced operator who will train him in the fundamentals of electricity, familiarize him with the circuits and equipment, and his duties, and that later on he will be assigned as a relief operator and attendant at one-man stations; that at such stations, the attendant was supposed to remain within hearing distance of the emergency bell for 24 hours a day, five days a week; that it was the duty of the apprentice or relief operator to relieve the regular attendant on his days off, which would necessitate the apprentice or relief operator remaining within hearing distance of the emergency bell [263] for 24 hours a day

for two days, at the end of which time he would proceed to another station under the same conditions, until he had worked five days, and during the period we were working six days a week because of Southern California being on a forty-eight hour week, I would state that he would have to remain within hearing distance of the emergency bell for twenty-four hours a day for six days a week instead of five.

I stated to each applicant that the next step in his promotion would be an attendant's job; that he would have a home to live in on the Company's property, which would be rented from the Company, and work under the same conditions as the attendant whom he had been relieving; that the work was fairly light, requiring only a few hours a day, including periodical logging of meter readings, and occasional mowing of lawns, trimming shrubs, etc. We also impress upon the applicant that one of the requirements of the job either as relief operator or afterwards as a resident attendant operator would be to remain within hearing distance of the emergency alarm for twenty-four hours a day, five days a week, and during the time we were on a six day week basis, for six days a week; that his actual active duties would probably occupy only two or three hours a day, and for the remainder of the time he could do as he pleased, so long as he remained within hearing of the alarm bells. I informed each applicant that he would receive a designated monthly salary for the position, which would be paid to him in semi-monthly installments.

After the defendant commenced paying time and a half for any active service performed by substation operators and attendants or relief operators and attendants during night time hours, as defined in the third paragraph

of defendant's answer to the third amended complaint, I would explain to each applicant prior to December 24, 1943, that he would be paid overtime or time and a half (I used the expressions interchangeably) for any service which he was called upon [264] to perform between the hours of ten o'clock p. m. and eight o'clock a. m., and after December 24, 1943, that he would be paid overtime or time and a half for any such service performed between six o'clock p. m. and eight o'clock a. m. I do not remember prior to the war any applicant for a position as apprentice or relief operator ever asking me about being paid overtime. During the war I do remember that there were a few applicants who I cannot identify by name who asked if they were paid any overtime or standby time, and I would invariably answer no, that they were paid a monthly salary which covered the entire job, and was the only compensation except for overtime payments made for any actual service performed between the hours of ten o'clock p. m. and eight o'clock a. m. or between six o'clock p. m. and eight o'clock a. m., dependent upon the period. I never at any time stated to any applicant who was discussing or considering a position as a substation apprentice operator or station attendant that his monthly salary was based upon any eight hours of work or any hours of work, or made any statement to him other than as I have heretofore stated.

While I was in charge of the office and supervising it, Mr. Garrison interviewed far more applicants than I did, but I know from hearing those interviews that the statements he customarily made were substantially along the lines set out that I made; also, during the last year or eighteen months when we have had additional help, they have also made the same statements.

Any language in the present tense has been used merely as a matter of expression and, while outlining the present custom, is equally applicable to all times covered by this affidavit, that is to say from March, 1942, to the present, and for that matter, is applicable to some period of time prior to said 19th [265] day of March, 1942.

WILLIAM H. SHORT.

Subscribed and sworn to before me this 22 day of September, 1947.

(Seal)

O. W. SCOTT

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Sept. 29, 1947. Edmund L. Smith, Clerk. [266]

[Title of District Court and Cause.]

AFFIDAVIT OF J. D. GARRISON IN OPPOSITION
TO MOTION FOR PARTIAL SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

J. D. Garrison, being first duly sworn, deposes and says:

I am a citizen of the United States and resident of the County of Los Angeles, State of California.

I am employed by the defendant in the action above entitled and have been employed by it for more than ten years last past. I am, and for more than ten years last past have been employment agent for the defendant, and am the Garrison referred to in several of the depositions that have been taken herein.

Mr. William H. Short is the head of the department wherein I work. [267]

I have read the Answer of the defendant to the Third Amended Complaint herein and the affidavit of Mr. Short, which is served and filed contemporaneously herewith, and state that the facts therein stated with reference to the methods of interviewing applicants is true and correct, and I adopt the same as my affidavit.

As stated in his affidavit, up until a year or a year and a half ago he and I were the only persons in the department who interviewed applicants for positions in the Operating Department, and I have interviewed the large majority of them.

As Mr. Short's affidavit covers the methods of interviewing all applicants, I will confine myself to the interviews which I have had of applicants who have ultimately been employed as substation apprentice or relief operators. As stated further in Mr. Short's affidavit, usually an applicant does not ask for any particular job or position, and it has not infrequently happened that applicants who have never heard of a substation operator and attendant have made application therefor after discussing that employment with me; and applicants who have had experience or qualifications for more than one job, after considering all such jobs have also selected that employment, and the converse has been equally true, that occasionally persons who had an idea of being employed as substation operators and attendants, or who were qualified for that and another position, after discussing it would make application for another position.

All the applicants who considered the job of substation operator and attendant I would tell that their first em-

ployment would be as apprentice or relief operators; that they would have a short period under an experienced operator who would train them in the fundamentals of electricity, familiarize them with the circuits, equipment, and their duties, and that later they would be assigned as relief operators and attendants at one-man stations; that at such stations they were supposed to remain within hearing distance [268] of the emergency bell for twenty-four hours a day, five days a week, and when we were operating six days a week because of Southern California being on a forty-eight-hour week, I would tell them that they were required to remain within hearing distance of the emergency bell twenty-four hours a day for six days a week; that it would be the duty of an apprentice or relief operator to relieve the regular attendant on his days off, which would necessitate the apprentice or relief operator's remaining within hearing distance of the emergency bell for twenty-four hours a day for two days, at the end of which time he would proceed to another station, under the same conditions, until he worked five days; and, of course, during the period when we were working six days a week, until he had worked six days.

I stated to the applicant that the next step in his promotion would be an attendant's job, and that he would have a home to live in on the Company's property, which would be rented from the Company, and that he would work under the same conditions as the operator and attendant whom he had been relieving. I told him further that the work was fairly light, requiring only a few hours a day, including periodical logging of meter readings, occasional mowing of lawns, trimming of shrubs, etc. I also impressed on the applicant that one of the requirements of the job either as relief operator or afterward as

a resident attendant operator would be to remain within hearing distance of the alarm bells twenty-four hours a day, five days a week, and, during the time we were on a six-day-week basis, six days a week; that his active duties probably would occupy only two or three hours a day, and for the remainder of the time he could do as he pleased, so long as he remained within hearing distance of the alarm bells.

I informed each applicant that he would receive a designated monthly salary for the position and would be paid in semi-monthly installments. [269]

After the Company inaugurated the system of paying overtime compensation for emergency services during the nighttime hours as defined in the third paragraph of the First Answer of the defendant to the Third Amended Complaint, I would explain to each applicant that he would receive such overtime payments for such emergency services.

Before the commencement of the war, I do not remember any applicant ever having discussed overtime compensation with me. After the war I believe there were a few applicants, whom I do not remember by name, who asked me whether they would be paid overtime or standby time, and I invariably answered, "No,"—that they were paid so much a month, which covered the entire job, except that they were paid for any actual active service performed during the nighttime hours as they are defined in the Answer to the Third Amended Complaint.

I cannot identify any of the plaintiffs by name and therefore cannot state that I did or did not interview as applicants either Eugene L. Ellingsworth or H. S. Kaneen, whose depositions I have been informed have been taken,

and who have testified that they were interviewed by me. If I saw them, I should probably recognize them. I have not read the depositions of either, but state unequivocally that I did not tell any applicant whom I interviewed that his salary would be based upon an eight-hour day, or that it would be computed upon an hourly rate of eight hours per day, or any other hourly rate. I had absolutely no information or instructions upon which I could have made such a statement. My understanding always has been that each and every substation operator and attendant was paid a monthly salary which was full payment for all services, of any nature, which he performed, and I so informed every applicant. I do not mean that I used precisely those words, but as heretofore stated, I informed each applicant of his duties, and of the requirement of his remaining twenty-four [270] hours a day within hearing of the emergency alarm except on his days off, and that he would receive a monthly salary for his job. There was never any discussion between any applicant and me with regard to that salary being on an hourly, weekly, or any other basis, and there was never any discussion with me of overtime or standby time, except as hereinbefore stated.

As stated, I have interviewed far more applicants than Mr. Short, but from overhearing interviews between applicants and Mr. Short and between applicants and other associates in the office during the last year or year and a half when there has been additional personnel in our department, I know that Mr. Short's recent associates ordinarily made substantially the same statements to persons making application for the position of apprentice or relief substation operator and attendant.

Further deponent sayeth not.

J. D. GARRISON

Subscribed and sworn to before me this 20th day of September, 1947.

(Seal)

O. W. SCOTT,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Sep. 29, 1947. Edmund L. Smith, Clerk. [271]

[Title of District Court and Cause.]

AFFIDAVIT OF C. E. PICHLER IN OPPOSITION
TO MOTION FOR PARTIAL SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

C. E. Pichler, being first duly sworn, deposes and says:

That he is a citizen and resident of the State of California, County of Los Angeles, and Assistant Comptroller of the defendant in the action above entitled; that he has been such for approximately two and a half years, and that he has been in the Comptroller's Department of the defendant for over twenty years; that he has read the third amended complaint and the answer of the defendant thereto, filed contemporaneously herewith.

Affiant states that he is familiar with the payroll records and the methods by which defendant makes payment to its employees, [272] and that affiant has personally supervised the examination of the payroll records of the plaintiffs herein for the purpose of making certain compilations requested by counsel for the defendant in the above entitled action.

That each and all of the plaintiffs classed as substation operators and attendants or substation relief operators and attendants made out their own daily or weekly time reports and made entries thereon as overtime for the time which each one claimed to have spent in performing any service for the defendant during the night time hours as defined in the answer to the third amended complaint. That each and every said plaintiff has been paid not less than time and a half for all overtime shown on the said time reports. That each said report of each such plaintiff during all the times referred to in the third amended complaint has shown eight hours of normal working time, neither more nor less, for each day on which said plaintiff reported as working. In this connection, affiant states that wherever any of the said plaintiffs reported for work on a day, he still reported eight hours of work even though he was taken ill or had an accident and was forced to discontinue any active service during the balance of said day.

The said reports showing eight hours of normal time were accepted by the Comptroller's Department notwithstanding the fact that it was well known and understood that the normal active service of persons employed in such substation classifications at substations of the type involved in this case did not consume eight hours per day. That the eight hours per day shown by the respective plaintiffs on such time reports as normal time on each day worked as aforesaid was accepted by the Comptroller's Department because, taking the fact into account that while such employees were required to remain on the premises twenty-four hours a day they were actually [273] only performing active duties for the Company a few hours a day (substantially less than eight), and that they

were free to spend the balance of the twenty-four hours as they desired, the time worked for pay purposes was considered to be the equivalent of eight hours of active service. Affiant states that there was no other basis upon which to accept the said figures of eight hours a day normal time; that none of the said substation operators or relief operators had any scheduled hours of work, being at liberty, except for the time required to perform some certain designated services such as calling a switching center, or turning on street lights, or other similar services, to perform their services at any time during the day in any manner that they saw fit.

That at no time did any of such plaintiffs report less than eight hours' normal time for any day worked, and at no time did any of them report any time as overtime solely because they were required to remain on the premises subject to being called out for emergency active services, or any overtime except for services performed during night time hours, as defined in defendant's said answer to the third amended complaint.

That when, in January 1942, it was decided by the management to pay overtime to substation operators and attendants and relief operators for emergency services performed during designated night time hours (after 10:00 P. M. and before 8:00 A. M.), and it became necessary therefore to figure an hourly rate for overtime calculations, the Comptroller's Department used the same method as that used in calculating such hourly rate for any other employee paid by a monthly salary, viz., by multiplying the monthly salary by twelve (the number of months in a year), and dividing the result by fifty-two (the number of weeks in a year), and dividing the result thus arrived at by forty, and multiplying the result one

and a half times. As there were no scheduled hours of work of such [274] employees, and except for the time required at certain stations to telephone switching centers at certain times or to turn on street lights, they could perform their normal active services at any time, and as such active services would normally be much less than eight hours per day, and on a five day week much less than forty hours per week, the hourly rate was so figured because their job as a whole was understood to be the equivalent of eight hours of active service.

During the time that the substation operators and attendants and relief operators and attendants were required to work for six days a week because of Southern California being upon a forty-eight hour a week basis, the said employees, including any of the plaintiffs employed in that capacity in this suit, reported for the sixth day eight hours of overtime, no more or less, except where they reported emergency service during the night time hours, as those terms are defined in the answer to the Third Amended Complaint.

Further deponent saith not.

C. E. PICHLER

Subscribed and sworn to before me this 25th day of September, 1947.

(Seal)

GEORGE J. ARBLASTER,
Notary Public in and for the County of Los
Angeles, State of California.

[Endorsed]: Filed Sep. 29, 1947. Edmund L. Smith,
Clerk. [275]

[Title of District Court and Cause.]

AFFIDAVIT OF R. G. KENYON IN OPPOSITION
TO MOTION FOR PARTIAL SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

R. G. Kenyon, being first duly sworn, deposes and says as follows:

I am a vice president of the defendant Southern California Edison Company, Ltd., charged with the responsibility of handling personnel problems, and have been a vice president of that company since on or about the 19th day of January, 1945.

I have been employed by the defendant since June, 1917, and on July 1, 1942, I was made assistant vice president of the defendant company, and charged with the responsibility of handling personnel problems. Although my title has been changed, as indicated, to that of vice president, my duties have been substantially [276] the same since my first appointment as assistant vice president.

I have read the Answer of the defendant to the Third Amended Complaint served and filed contemporaneously herewith.

My principal work in handling personnel problems is in dealing with unions and with employees regarding the terms and conditions of their employment. In negotiating with the unions or discussing the terms and conditions of employment of any individual employee or group thereof, it becomes necessary to discuss the terms and conditions of their employment with the heads of the re-

spective departments, and it is part of the duties of my office to see that the terms and conditions of employment of all the various employees of the company are in accordance with any contracts which we have with any union or with any group of employees and with applicable laws and regulations.

From July 1, 1942, and during the balance of the year, I was very largely engaged in making a study of industrial relations with particular reference to the employee and labor relations problems of utility organizations as a background for the initial organization of the industrial relations department of the defendant, and of carrying on the functions to be undertaken by such department.

The first labor union that was certified as a collective bargaining agent for any of the employees of the company was the U. W. O. C., C. I. O., which was certified on or about the 3rd of August, 1943, and it was some months after that that I entered into my first negotiation with that Union for and on behalf of the defendant company.

While engaged in the aforementioned studies, I had to and did familiarize myself with the Fair Labor Standards Act and with the Interpretative Bulletins of the Wage and Hour Administrator that had been issued, including Interpretative Bulletin 13, issued in July of 1939, and its subsequent revisions. It was my opinion [277] then and has been ever since that Paragraphs 6 and 7 were and are particularly applicable to our resident type employees, and Paragraph 8 to our primary servicemen; and ever since, it has been my opinion that the method of compensation of those classes of employees as set out in the Answer to the Third Amended Complaint was in compliance with the Fair Labor Standards Act, assuming that said employees or any of them were subject to the Act.

I discussed this subject with the heads of all of the various departments affected. They indicated that they were of the same opinion, and the company at all times in good faith relied upon said Bulletin.

I was familiar with the fact that there was an issue between the Union and the Pacific Gas & Electric Company, which arose sometime in the latter part of 1942 or the early part of 1943, and that it had been certified to the National War Labor Board, and I was furnished copies by the Pacific Gas & Electric Company of the recommendation of the mediation panel and later of the decision of the Board.

The said background studies which I had made during 1942-1943 included the methods of employment and compensation of the electrical companies operating on the West Coast, including the Pacific Gas & Electric Company; it was my understanding that their methods of employment and compensation of their resident employees, that is to say, their substation operators and attendants and relief operators and attendants, their hydro station operators and their head works tenders, were substantially the same as ours. I do not mean to say that their monthly salaries were the same (that I do not remember), but that the resident employees of the two companies were employed under substantially the same conditions, that is to say, all of the said employees were paid a regular monthly or weekly salary and nothing else except the overtime for active emergency services as alleged in defendant's Answer to the Third [278] Amended Complaint served and filed contemporaneously herewith. I do not mean to say that the nighttime hours were precisely the same as those of the defendant, as there might have been some variation, but that they were, as I recollect, substantially the same.

It was my interpretation of the decision of the War Labor Board, approving the recommendations of the

mediation panel with reference to resident employees, that the proper evaluation of the jobs of such resident employees, considering their active and their inactive duties, was not greater than an employment of eight hours of active service, and that our company's arrangement with such employees for paying them a monthly salary and not less than time and a half for emergency services as alleged in defendant's Answer herein to the Third Amended Complaint, was a reasonable, proper and lawful arrangement and was not violative of the Fair Labor Standards Act. Indeed, the recommendation of the panel and its adoption by the National War Labor Board simply confirmed my interpretation and understanding of Interpretative Bulletin No. 13, which was referred to and relied upon by the Pacific Gas & Electric Company in its brief before the Board.

While I cannot remember any specific conversation with any department head, I know that I expressed these views to the various department heads during my regular discussions with them concerning terms of employment.

Had the decision of the War Labor Board as to resident employees been in favor of the contention of the Union and to the effect that such resident employees were entitled, in addition to their monthly salary and the said overtime payments for emergency services performed during said nighttime hours, as said terms are defined in the Answer of the defendant herein to the Third Amended Complaint, because of being required to remain on the defendant's property for twenty-four hours per day, to a twenty-five per cent or any other percentage as a bonus, it would have been my duty to [279] have, and I would have immediately, called that fact to the attention of the executive officers of the defendant company, including Mr. Mullendore, as the executive vice president, and to

the heads of all of the operating departments, and would also have consulted our legal department, for the purpose of having the company reach a determination as to what was to be done in the light of such decision.

For the reasons heretofore stated, I took no such steps, and the company continued the method of compensating said resident employees as set out in the Answer to the Third Amended Complaint.

I also relied upon the fact that in my background studies I had been informed that representatives of the Wage and Hour Division of the United States Department of Labor had examined our records and methods of employment and payment, and that no complaint, formal or informal, had been made, that we were in any way violating any provisions of the Fair Labor Standards Act.

I relied, and the company through me relied, upon the said Interpretative Bulletin 13 and the said decision of the War Labor Board, based as it was on the recommendation of the mediation panel and on the fact as stated that no complaint was ever made by the Administrator of the Wage and Hour Law or by any other department of the Government that the defendant company was in any way violating the Fair Labor Standards Act.

Further affiant saith not.

R. G. KENYON

Subscribed and sworn to before me this 25th day of September, 1947.

(Seal)

MEREDITH KOCH

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Sep. 29, 1947. Edmund L. Smith, Clerk. [280]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM C. MULLENDORE IN
OPPOSITION TO MOTION FOR PARTIAL
SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

William C. Mullendore, being first duly sworn, deposes and says:

I am President of the defendant company, and have been since on or about the 20th day of April, 1945. Prior to that I was and had been since December 23, 1931, Executive Vice-President of the Company and in 1941 I was Chairman of the Statewide Industrial Committee of the State Chamber of Commerce.

On the 5th day of June, 1941, there was arranged a broadcast by the Wage and Hour Division of the United States Department of Labor in the form of questions which I propounded to Mr. John A. Stellern, Southern California Manager of the Wage and Hour Division [281] of the Department of Labor. The said questions and answers were written out beforehand and submitted to the broadcasting company for approval. Before the broadcast, Mr. Stellern and I went over the questions and answers and rehearsed them. I do not know who prepared the questions. I did not. My best recollection now is that the questions and answers were prepared by someone from the Chamber of Commerce in cooperation with Mr. Stellern and/or his assistant.

The broadcast was arranged, as aforesaid, by the Wage and Hour Division of the Department of Labor, and I be-

lieve that the local Chamber of Commerce had requested it. The object was to acquaint employees and employers generally with some idea of the workings of the Fair Labor Standards Act.

Among the questions and answers are the following:

“Mullendore: Well, how would you classify, for instance, radio stations?

“Stellern: A radio station is engaged in interstate commerce. It sends out over the air music, news and advertisements. You see, Mr. Mullendore, interstate commerce is defined in the Fair Labor Standards Act as ‘trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof’. For instance, in your company you bring electrical power from outside the State and distribute it. Every employee engaged in that phase of your business is entitled to all the benefits of the Act. I am happy to be able to tell you that your company was one of those whose records were inspected in this current program, and we found that you are operating in complete compliance with the Act.”

The underlining is mine and was not in the original script. I remember very clearly the underlined statement. I first saw it [282] when the script was submitted to me, and was very much gratified and pleased by it. I told all of the heads of our departments of it and it naturally led me to believe as Executive Vice-President of the Company that the methods of compensating all of our employees including our resident employees were correct—and by “resident employees” I mean head works tenders,

hydro station attendants and hydro station relief attendants, substation operators and attendants and relief substation operators and attendants.

I also knew of Interpretative Bulletin 13, which was originally issued in July of 1939. It was my understanding as Executive Vice-President from discussions which I had with the heads of the departments and members of our legal staff, that the bulletin was entirely applicable to all resident employees, and that we were not required to pay them anything in addition to their monthly salary for so-called standby time.

As Executive Vice-President I also knew of the dispute between the employees of the Pacific Gas & Electric Company and the Company and its reference to the National War Labor Board in 1943; and of the report and recommendation of the Mediation Panel and of the Directive Order of the Board thereon, and I discussed with other members of the Company the general effect of both.

I cannot say now whether I personally read any part of the recommendations of the Panel or of the order of the Board, but I knew the recommendations of the Panel and the decision of the Board thereon were generally to the effect that so far as resident employees were concerned (which would include substation operators and attendants, relief operators and attendants, hydro station attendants and their relief attendants, and head works tenders, although they are not required to live on company property), their employment, properly evaluated, was the equivalent of not more than eight hours per day or forty hours per week of active service. It [283] is and was my understanding generally that the conditions of employment of such employees by the Pacific Gas & Electric Company

so far as remaining on the premises was concerned, and the method of payment of the resident employees of the Pacific Gas & Electric Company were substantially the same as the employment of the same class of employees by the defendant herein.

Had the decision of the War Labor Board been to the effect that the resident employees were entitled to any different compensation, as the Company's Executive Vice-President it would have been my duty and I certainly would have taken steps to see that our Company considered the question as to whether any additional compensation was due such employees for any so-called standby time; but as Executive Vice-President of the Company I assumed from Interpretative Bulletin 13 and the recommendation of the Mediation Panel and the decision of the War Labor Board thereon and also from the radio statements of Mr. Stellern above quoted that the Company, if subject to the Fair Labor Standards Act, was complying in all respects with it; and that its method of compensation to its resident employees, and for that matter to all of its employees, was in full compliance with the Fair Labor Standards Act, if the said Act was applicable to any of the Company's employees.

This assumption was strengthened by the fact as time went on that there was no complaint made by the administrators of the Wage and Hour Act or by any other governmental agency that we were not fully complying with the Act, and as Executive Vice-President I acted and relied upon the said assumption above set forth based on each and all of the sources heretofore stated.

WILLIAM C. MULLENDORE

Subscribed and sworn to before me this 18th day of September, 1947.

(Seal)

DOROTHY M. HAWKINS

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires Dec. 16, 1950. [284]

Received copy of the within named affidavits on behalf of defendant in opposition to motion of plaintiffs for partial summary judgment this 29 day of September 1947. David Sokol (SJF), Attorney for Plaintiffs.

[Endorsed]: Filed Sep. 29, 1947. Edmund L. Smith, Clerk. [285]

[Title of District Court and Cause]

DEFENDANT'S RESPONSE TO REQUEST FOR
ADMISSION OF FACTS UNDER RULE 36
OF THE RULES OF CIVIL PROCEDURE

The plaintiffs having duly served upon the defendant their Request for Admissions under Rule 36 of the Federal Rules of Civil Procedure by letter dated September 16, 1947.

I.

Defendant's Response to the First Requested Admission as genuine of Division Order #4, dated January 21, 1935, attached to the Request for Admissions as Exhibit "A":

(a) Defendant admits the genuineness of Division Order #4, [286] dated January 21, 1935, attached to the Request for Admissions as Exhibit "A," except that it contains the following typographical errors, to wit: in

Line 19, the words, "If not, if," should read, "If not, it"; and in Line 21, the words, "Two men or more Station," should read, "Two man or more Station."

Defendant admits that the said Division Order #4 as set out in Exhibit "A" with the corrections above noted was in effect during the period of this action with respect to the Southern and Long Beach Divisions only.

(b) Defendant admits the genuineness of the Operating Department Order signed by C. M. Cavner, attached to the Request for Admissions as Exhibit "B," except that it contains a typographical error in the footnote. Instead of reading as set out in Exhibit "B," the original reads, "Which includes station attendants and any other employee who may be temporarily assigned to this classification."

Defendant admits that, with the correction above noted, said Exhibit "B" as revised was in effect only from on or about January 1, 1943.

(c) Defendant admits the genuineness of Operating Department Order #A-26, dated July 1, 1935, attached to the Request for Admissions as Exhibit "C," except that it contains the following typographical error, to wit: in Line 7 thereof, the word "practive" should read, "practice." Defendant denies that there was any signature to said order.

Defendant admits that, with the correction and exception above noted, said Exhibit "C" was in effect from on or about July 1, 1935.

(d) Defendant admits the genuineness of Operating Department Order #A-30, dated June 11, 1935, attached to the Request for Admissions as Exhibit "D," except that it contains the following typographical error, to wit:

in Line 30, on the first page thereof, the word "men" should read "man." Defendant denies that there was [287] any signature to said order.

Defendant admits that, with the correction and exception above noted, said Exhibit "D" was in effect from on or about June 11, 1935.

II.

Defendant's Response to the Second Requested Admission:

(a) Defendant admits that the Order A-36 as revised on January 1, 1943, contained, among others, the paragraphs set out in the request for admission. Defendant denies that said Order A-36 as revised January 1, 1942, contained said paragraphs; admits that the said Orders A-36 as revised on January 1, 1942 and as revised on January 1, 1943, which have heretofore been offered by plaintiffs and received in evidence at the pretrial hearing as Plaintiffs' Exhibits 1 and 2, were genuine and correct, and that the copies received in evidence are true and correct copies of such documents, and that the said Order A-36 as revised on January 1, 1942 was effective from that date up until its revision on or about January 1, 1943.

Dated: Los Angeles, California, October 1, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California

Edison Company, Ltd. [288]

[Verified.] [289]

Received copy of the within Defendant's Response to Request for Admission of Facts this 1st day of October 1947. David Sokol, Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 1, 1947. Edmund L. Smith, Clerk. [290]

[Title of District Court and Cause]

DEMAND FOR JURY TRIAL

Comes now the plaintiffs and demand that the above entitled action be set for trial before a jury on the third amended complaint and the issues and defenses raised in the answer of defendant to said third amended complaint.

DAVID SOKOL

Attorney for Plaintiffs [291]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 6, 1947. Edmund L. Smith, Clerk. [292]

[Title of District Court and Cause]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant Southern California Edison Company, Ltd. and severally moves the court for a summary judgment in favor of the defendant against each several plaintiff upon the ground that on the entire record it appears as a matter of law that the defendant is entitled to a judgment against each several plaintiff and that there is no genuine issue as to any material fact

which, if decided in favor of the plaintiffs, or any of them, would entitle the plaintiffs, or any individual plaintiff, to a judgment.

Said motion is made and based upon all the files and records in said cause including, but not limited to, the depositions now on file, the affidavits filed by the plaintiffs in support of the motion of certain of the plaintiffs for partial summary judgment, the affidavits filed by the defendant in opposition to said motions, and the affidavits filed contemporaneously herewith in support of this motion, [293] to wit, the affidavits of G. R. Woodman, C. E. Pichler, E. N. Husher, and J. A. Stellern, and upon the points and authorities filed herewith and the points and authorities heretofore filed by the defendant in opposition to the motion of certain of the plaintiffs for partial summary judgment.

Dated: Los Angeles, California, October 22nd, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd.

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith,
Clerk. [294]

[Title of District Court and Cause]

NOTICE

To: The Plaintiffs in the above entitled action, and to
David Sokol, Esquire, their attorney:

You, and Each of You, Will Please Take Notice that
the defendant's motion for a summary judgment severally
against each several plaintiff will be called by the defend-
ant for hearing on Tuesday, the 9th day of December,
1947, at ten o'clock a. m., or as soon thereafter as counsel
can be heard.

Dated: Los Angeles, California, October 22nd, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd. [295]

Received copy of the within Notice and Motion for
Summary Judgment this 22nd day of October, 1947.
Elizabeth Watson for David Sokol, Attorney for Plain-
tiffs.

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith,
Clerk. [296]

[Title of District Court and Cause]

AFFIDAVIT OF C. E. PICHLER

State of California

County of Los Angeles—ss.

C. E. Pichler, being first duly sworn, deposes and says:

I am the same C. E. Pichler who made an affidavit heretofore in opposition to the plaintiffs' motion for summary judgment. I have read the affidavit of G. R. Woodman contemporaneously served and filed herewith and state that the method of the hydro station attendants, apprentice attendants and head works tenders of reporting their time as therein stated is correct. Further, that where the report of any of said class of employees, to wit, hydro station attendants, apprentice attendants, or head works tenders, showed more than forty hours of work per week, on and since May 1, 1941, they have been paid [297] time and a half for the excess above forty hours per week.

In computing the hourly rate for the purpose of paying time and a half, the same method was used as set out in my former affidavit as to computing the hourly rate of the substation operators and attendants. The fact is that such method is the one used in computing the hourly rate for the purpose of paying time and a half as to all employees of the Company who are paid a monthly salary.

As in the case of substation operators and attendants, the time reports of the hydro station attendants and apprentice attendants and of the head works tenders, including those of the plaintiffs employed in that capacity,

showing each day not less than eight hours of service were accepted by the Company on the same theory as the reports of the substation operators and attendants were accepted, viz.: that although it was understood that as to the said hydro station attendants and apprentice attendants and the head works tenders during a large portion of the days of any month or year they would not perform eight hours of service, that the proper evaluation of their job, including their active and inactive services, was the equivalent of eight hours of active service per day.

At all times mentioned herein, each hydro station attendant and apprentice attendant, and each head works tender kept his own time records and made his own time reports, and the only records of which the Company has or has ever had of the hours worked by any of said employees, including each and all of the plaintiffs employed in such capacities, are based on their said time reports.

Affiant states that during the time the Hydro Division was operating on a forty-eight hour a week basis, pursuant to the requirements of the War Manpower Commission, the said reports of the hydro station attendants and apprentice attendants and of the head works tenders showed for the sixth day eight hours of overtime work, and as stated in the affidavit of G. R. Woodman, they also on occasion showed additional time where they had performed emergency services [298] on said day.

Affiant states that there has never been any payment to any of the said hydro station attendants, apprentice

attendants, or head works tenders, including the plaintiffs employed in such capacities, other than a monthly salary until July 1, 1947, from and after which they have been paid a weekly salary, and time and a half for such time as they reported as having worked in excess of forty hours per week, except that commencing on and about May 1, 1943, time and a half has been paid to some of said employees where they reported more than eight hours of work for any one day regardless of whether the report of said employee showed more than forty hours per week.

As to the primary service men, affiant states that each and every primary service man during all the times mentioned herein kept his own time report, and that the defendant Company has not and has never had any records of the hours worked by them except such as are based upon said reports; that the said primary service men were employed upon a definite eight hour a day shift, and except where they could not work during the day because of sickness or otherwise, they always reported eight hours. In addition thereto, the reports always showed overtime for any active service which they reported as performing after the expiration of one shift and before the commencement of another. That when the Distribution Division was operating upon a forty-eight hour a week basis because of the requirements of the War Manpower Commission, each primary service man reported eight hours of overtime for the sixth day, and no other overtime, except such overtime as he may have reported for emergency service performed before or after his shift on said sixth day; and at no time ever reported any over-

time for being required to advise his switching center after the end of his day's shift in case he left his home where he could be reached, nor did any of the primary service men at Santa Paula ever report any overtime for being required during certain days of the week to take telephone calls direct from customers in their homes, or in [299] the event of leaving their homes on said days, advising the switching center as to where they could be reached in case of an emergency.

Affiant states that there has never been paid to any primary service man, including any of the plaintiffs employed in said capacity, any compensation whatever, except for an occasional bonus paid for detecting meter tampering or reporting the names of prospects which would result in the ultimate sale of a range or water-heater, other than the monthly salary up to July 1, 1947, and on and after said date, a weekly salary and time and a half for any active service he reported as performing between shifts, as hereinbefore stated.

C. E. PICHLER

Subscribed and sworn to before me this 15th day of October, 1947.

(Seal)

BARBARA ROWE

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires: June 5, 1950.

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith, Clerk. [300]

[Title of District Court and Cause]

AFFIDAVIT OF E. N. HUSHER

State of California,
County of Los Angeles—ss.

E. N. Husher, being first duly sworn, deposes and says:

I am a citizen of the United States, and a citizen and resident of the County of Los Angeles, State of California, and have been such for approximately forty-five years. I am connected with and employed by the defendant, Southern California Edison Company, Ltd., as Assistant Manager of Operation, and have been such for approximately two weeks. For approximately five years prior to assuming my present position, I was Superintendent of Distribution. As Superintendent of Distribution I had charge of the operation of distributing electrical energy, and the primary service men were in my department and under my supervision, and I [301] am familiar with their duties.

The primary service man is often referred to, and has in times past in the defendant Company been referred to, as a "trouble man". His principal duties are:

Primary Service Men (Santa Paula District)—John M. Smith, W. H. Culbertson and L. A. Phinney; Huntington Beach District—A. L. Honnell, P. W. Cockrell and C. C. Prinslow: Maintains service on distribution lines and street light circuits in his district, makes emergency repairs to restore interrupted service, and patrols lines to note conditions hazardous to continuous service, restores service by replacing primary and secondary fuses. As instructed by switching center, switches and parallels circuits in unattended substations, patrols street lights in his district, an average of one night a week.

Vernon City District—J. D. Borden:

Maintains service on distribution lines and street light circuits in his district, makes emergency repairs to restore interrupted service, and patrols lines to note conditions hazardous to continuous service, restores service by replacing primary and secondary fuses. As instructed by switching center, switches and parallels circuits in unattended substations, patrols street lights in his district twice a week when on P. M. schedule and answers fire calls in Vernon City area.

Each and every primary service man employed by the defendant Company, including each of the plaintiffs employed in that capacity, were employed at all times before, prior to, and after March 19, 1942, up to the present time, on a definite eight hour shift basis per day, for which, at all times herein mentioned, they have been paid a definite monthly salary payable semi-monthly until July 1, 1947, from and after which date they have been paid a weekly salary. In a majority of the districts, the hours of the shift were from eight in the morning until five in the afternoon, [302] with one hour for lunch. In one or two districts the hours of the shift were from seven-thirty in the morning until four-thirty in the afternoon, with one hour for lunch.

At the termination of the shift, each and every primary service man was free to do what he pleased, go where he pleased, and live where he pleased. The Company did require of all of them, however, that they have a telephone in their residence, so that if, during the hours between the shift, there was an emergency for which their services were needed, they could be called by telephone, and each said primary service man was requested during certain days of the week if at the end of his shift he did not go

home or, after going home, he left his home, to advise the switching center where he was going so that in case of an emergency he could be reached. In addition to the above requirement, at Santa Paula the names of the primary service men were listed in the local telephone directory, and on the days they were required to notify the switching center where they could be reached in case they did not return to their homes or left their homes after returning, they were required when at home to take telephone calls direct from customers.

Wherever a primary service man, including each and all of the plaintiffs employed in that capacity, has, after the end of his shift and before the commencement of the shift upon the following day been called on to perform an emergency service, he has been paid time and a half for the time given to the performances of such service. At no times mentioned herein have any of the said primary service men, including each of the plaintiffs employed in that capacity, ever been paid anything other than their monthly salary and other than overtime for actual emergency services performed as aforesaid; nor has there ever been any contract or agreement to pay any said primary service man, including each of the plaintiffs employed in that capacity, anything other than his monthly salary and time and a half for emergency services performed be- [303] tween shifts; nor has there been any custom or practice in any of the districts to pay to any primary service man anything other than his said monthly salary and time and a half for the actual time reported by him in the performance of actual active emergency service between shifts.

If the requirement of the defendant hereinbefore set out that each primary service man at the end of his shift if he does not return to his home, or after returning

should leave his home, advise the switching center where he could be reached in case of an emergency, amounts to a service, or in case of primary service men at Santa Paula, the further requirement that during certain days of the week they take calls direct from customers, amounts to a service, there has been no payment made by the Company therefor to said primary service men other than a monthly salary; nor has there been any contract to make any payment therefor, nor has it been paid for by custom or practice in any district, or at all.

Each and every primary service man, including each of the plaintiffs employed in said capacity, at all times mentioned herein has made out his own time report, and the only records which the Company has, or has ever had, of the hours they worked are based on reports made out by said primary service men, including each of the plaintiffs employed in such capacity. Said time reports have a space for overtime, and none of the plaintiffs employed as primary service men, or any other primary service man, has at any time ever reported any overtime based upon being required to advise his switching center where he could be reached if he either did not return to his home at the end of his shift or, after returning home, left his said home; nor by any service man employed at Santa Paula being required at any time to answer telephone calls in his own home from customers.

During the time that the Distribution Division of the defendant was upon a forty-eight hour a week basis, pursuant to [304] the requirement of the War Manpower Commission, each and every primary service man, including each and all of the plaintiffs employed in said capacity, reported for the sixth day eight hours of overtime and no more, unless he was called on during the sixth day

either before commencing or after the termination of his shift, to perform an emergency service.

E. N. HUSHER

Subscribed and sworn to before me this 14th day of October, 1947.

(Seal)

DOROTHY M. HAWKINS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith, Clerk. [305]

[Title of District Court and Cause]

AFFIDAVIT OF G. R. WOODMAN

State of California

County of Los Angeles—ss.

G. R. Woodman, being first duly sworn, deposes and says:

I am a citizen of the United States and a resident of the County of Los Angeles, State of California, and employed by the defendant Southern California Edison Company in the capacity of Superintendent of Hydro Generation.

I became Hydro Engineer of the Hydro Division in March, 1938, and remained such until July 1, 1942, when I became Assistant Superintendent of Hydro Generation. On July 1, 1943, I was Acting Superintendent of Hydro Generation, and on July 1, 1944, I was made Superintendent of Hydro Generation and have remained such ever since. [306]

I am, and during the times mentioned have been, familiar with the employments and duties of the various classes of employees in said Hydro Division.

(1) Hydro Station Attendants

At the present time, and since March 19, 1942, and prior thereto, our apprentice hydro station attendants in a majority of cases have been taken from the utility crews, but occasionally we have employed as apprentice operators persons not previously connected with or employed by the Company. An apprentice operator is trained at a hydro station under an experienced operator, and the Station Chief is responsible for his training. As there becomes a need for a hydro station attendant, the place is filled by a qualified apprentice operator.

From and prior to March 19, 1942, Until October 27, 1945, each plaintiff hydro station attendant and apprentice attendant was required to live upon the Company's premises in a house which he rented from the Company. At certain of such hydro stations, which are usually spoken of as "canyon locations" or "hydro locations," there would be outlying hydro stations which would be attended to by one crew. As to all such locations the places of residence of the attendants of apprentice attendants would be located adjacent to the main station, with alarm bell extensions to the residences. During the times above mentioned, to wit, from and prior to March 19, 1942, until October 27, 1945, each of the said plaintiff hydro station attendants and apprentice attendants was required, except when traveling between stations or inspecting remote facilities, during certain days of the week to remain close enough to the main station house or his residence to be able to hear an alarm bell in case his services were

needed in the event of an emergency. The requirement of his so remaining in hearing distance of said alarm, for brevity of designation will hereafter be referred to as "standby time" or [307] "standby." Such standby time was not required of any of the plaintiffs more than five days per week, except when the Hydro Division was operating on a 48-hour week pursuant to the requirement of the War Manpower Commission, and in most stations less than five days per week. During the period of time that the said Hydro Division was operating on a 48-hour week, standby time was never required of any of said plaintiffs more than six days per week, and in most stations less than six days per week.

The said plaintiff M. H. Huntington is an exception to the foregoing statement. He was employed at Borel and at Kern River Station No. 1 during the period September 16, 1942, to October 31, 1944. At both of said stations the station attendants worked upon scheduled eight-hour shifts and then, during certain days, were required to remain so near their residences as to be able to answer an alarm in case of an emergency service. This was worked out by schedule so that each of the station attendants was required to so remain on or near his premises for less than five days per week. No other plaintiff in this case, or in the case of Drake, et al., v. Southern California Edison Company, Ltd., numbered in this court 5544-WM, worked at either of said stations.

During the interval commencing October 27, 1945, and ending May 1, 1947, the defendant converted all of its hydro stations to a scheduled shift basis, and as each station was placed on such basis the attendants were placed upon a scheduled eight-hour shift, at the end of which

time they were at liberty to go when and where they pleased and to do what they pleased. In the event of an emergency arising after their scheduled shift, such attendants, if they were available, were called out to do emergency work, in which event they were paid not less than time and a half for such call-outs.

Attached hereto as Exhibit "A" and made a part of this affidavit is a schedule showing the date that each of the said hydro stations was placed upon a shift basis. [308]

Prior to and since March 19, 1942, and until the particular station at which they operated was placed on a scheduled shift basis, said hydro station attendants, as stated, lived in Company houses and were privileged to have their families live with them, and, so far as I now recall, each and every hydro station attendant did have his family live with him; if they did not, it was purely because, for personal reasons, he did not desire to do so.

The normal duties of a hydro station attendant, prior to the station at which he worked being converted to a shift station, were periodically to inspect the hydro station and appurtenant facilities and to observe and report upon any unusual conditions, to maintain a station log, periodically to check the operation of the station and inter-plant alarm circuits, to clean and lubricate the station equipment, and, on orders, to start up and stop the machines and do any special switching, and to take care of the station, and the station and cottage grounds.

The time required of the various hydro station attendants and apprentice attendants to perform their active duties as above outlined would vary at each station and would vary at the same station depending upon conditions. Also the station grounds to be maintained were not the

same, and some would require more time to keep up than others. Also the size of the stations and the number of generating units would vary, but on an average throughout the year the normal active duties of each hydro station attendant and apprentice attendant could be performed in from four to eight hours per day, and during the year would, except as to Kern and Borel Stations, heretofore mentioned, average substantially less than eight hours per day.

Prior to each station going upon a shift basis, the station attendant and apprentice attendant, if there was one, had no schedule of fixed hours in which to perform their services, but by custom they were normally performed during daylight hours. At any time, the attendant, if he desired, for personal reasons, could [309] mow his lawn or do any work of servicing the equipment or cleaning up the station either in the early morning hours or in late evening. However, one of the attendants at each station which would include an apprentice attendant, if there was one, was required, unless prevented by a break in a telephone line, or by emergency service calling him from the station or other unusual duties, to make a morning and afternoon call to the switching center.

The specific time for the normal first call in the morning and for the last call in the afternoon would vary at the different stations, and ordinarily the first morning call would not be made later than 8:00 in the morning and the last afternoon call usually not later than 4:30 or 5:00 in the afternoon, although in periods when there were no storms or emergencies an attendant or apprentice attendant might make his last call as early as 2:30 or 3:00

in the afternoon. During the time that the attendant or apprentice attendant was not actively engaged, he could do as he saw fit and engage in any activities that he saw fit to engage in, and, except and until the station at which he was working was placed on a scheduled shift basis, he was required on certain days of the week, as aforesaid, to remain close enough to his residence or the station house to hear an alarm bell in case his services were required during an emergency.

Except in the case of the plaintiff M. H. Huntington, hereinbefore specifically dealt with, since March 19, 1942, and prior thereto, there have always been two or more men assigned for each attended location (consisting of a station or group of stations), and standby time was at all times required of one of such men. The result was that on certain days each attendant would be free to go where he pleased, but by custom did not leave the immediate vicinity of his residence without obtaining permission of the station chief or ascertaining that there would be at least one attendant remaining in the vicinity of the alarm bell in the event of an emergency.

During all times mentioned in this affidavit from and after [310] May 1, 1941, each and every hydro station attendant and apprentice attendant, including each and every one of the plaintiffs so employed, made out his own time report upon forms furnished by the Company, and the only records which the Company has, or has ever had, of hours worked by each said hydro station attendant and apprentice attendant, including each said plaintiff employed in said capacity, are based on their said time reports.

During all of the times herein mentioned, each of the said hydro station attendants and apprentice attendants, including each of the said plaintiffs employed in said capacities, has customarily reported not less than eight hours of work upon any day for which he reported working, regardless of whether he had performed eight hours of active service or not, and in addition thereto has reported any active service beyond eight hours; and in this connection has always reported as additional hours above the eight any active time consumed in performing any active service before the normal time for the first report to the switching center and after the last afternoon report to the switching center except as shown in example (3) hereinafter set forth. To illustrate the method of computing time, I will give three examples: (1) if a hydro station attendant or apprentice attendant was to make his first call to the switching center at 7:30 A.M., he would not report having performed more than eight hours of service, no matter what he was called on to do between then and 4:30 P.M., this regardless of whether he made his last call prior to 4:30 P.M. If, however, after 4:30 P.M. he was called upon to perform some active emergency service taking, say, one, two or three hours, he would report for said day as having rendered nine, ten or eleven hours of service, regardless of whether between the time of making his first call to the switching center at 7:30 A.M. and his last call at 4:30 in the afternoon, he had performed eight hours of active service, or any active service. (2) If the hydro station attendant or apprentice attendant had been called on for an emergency service, say, at five or six o'clock in the morning and had been occupied up until about 7:30 or 8:00 A.M., he would do one of two things: either report [311] for that day ten or eleven

hours of work, regardless of whether after 7:30 or 8:00 A.M. he had performed any active service or not, or else discontinue all active duties by 2:30 or 3:00 P.M. making his last call at that time and reporting eight hours for said day regardless of whether after 5:00 or 6:00 A.M. he had performed eight hours of active service or not. (3) If he had been called out, say, at 1:00 in the morning and continued such active duty until, say, 9:00 or 10:00 in the morning, he would usually be relieved for the balance of the day, in which event he would report eight or nine hours of service. If, however, he was not relieved, and assuming he normally made his first call at 8:00 in the morning, he would report fifteen or sixteen hours for said day, depending upon whether his call-out started at 1:00 or 2:00 in the morning, and this regardless of the amount of active duties performed after 8:00 in the morning or whether he performed any.

Prior to May 1, 1943, he was paid overtime only when his weekly report showed he had worked more than forty hours for that week. On or about May 1, 1943, at Kern River No. 1 Hydro Station, the defendant company commenced paying overtime for some work reported in excess of eight hours for any one day, even though the weekly report did not show more than forty hours per week, and that practice was gradually extended from station to station until, on or about October 1, 1945, the practice of paying overtime for all work reported in excess of eight hours for any one day, regardless of whether more than forty hours for the week was reported, was in effect at all hydro stations; but I am unable to state at the time of making this affidavit the precise time it went into effect at each of the stations other than Kern River No. 1.

I reiterate the statement that at all times mentioned in this affidavit from on or about May 1, 1941, the company has paid overtime at the rate of not less than time and a half for all work reported by any hydro station attendant or apprentice attendant in excess of forty hours per week.

Affiant states that each hydro station attendant or apprentice attendant, including each and all of the plaintiffs employed [312] in said capacities, was paid a monthly salary until July 1, 1947, from which time they have been paid a weekly salary. Affiant states that on and before July 1, 1947, each and all of its said stations had been placed on a shift basis, as hereinbefore stated, and, therefore, will not again refer to the said weekly salary but only to monthly salary. Affiant states unequivocally that no other compensation was ever paid to any hydro station attendant or apprentice attendant, including each of the plaintiffs employed in said capacity herein, except said monthly salary and overtime for work which he reported in excess of forty hours per week, and after May 1, 1943, for work reported in excess of eight hours per day as hereinbefore stated.

Affiant states positively and unequivocally that there was never any payment made to any station attendant or apprentice attendant other than his monthly salary for any standby time required of him as said term "standby time" has been hereinbefore defined, nor was there any payment for said standby time, other than his said monthly salary by any custom or practice at any of the said hydro stations, or at all.

Affiant states that, as aforesaid, the normal active duties of the average hydro station attendant and apprentice attendant, including each and all of the plaintiffs employed

in such capacities, would consume between four and eight hours per day; that notwithstanding this fact, as aforesaid, each said hydro station attendant and apprentice attendant, including each of the plaintiffs employed in said capacities, customarily reported not less than eight hours for any day on which he reported working. Affiant states that such reports were accepted, notwithstanding the fact that the Company well knew that on many days the hydro station attendant and apprentice attendant reporting eight hours performed less than eight hours of active service. Reports showing a uniform eight hours of service, except in the event of reporting overtime in the manner hereinbefore set out, were accepted by the Company on the theory that the active [313] duties and inactive duties hereinbefore defined as standby time were the equivalent of a job of not to exceed eight hours of active service. In other words, each hydro station attendant and apprentice attendant was employed to do a certain job which involved the performance of active duties and standby time, as hereinbefore defined and explained, during certain days of the week. For that job, as a whole, he was paid and accepted a fixed monthly salary, paid semi-monthly, and when he reported any overtime, the time and a half rate was computed on the theory that he was being paid for eight hours of active service per day, even though during the year or during any ordinary and average month, except at Kern River No. 1 and Borel Hydro Stations, the station attendant and apprentice attendant would not perform eight hours of active service during many of the days of the year or month.

As stated, none of the plaintiffs in the above case or in the case of Raymond F. Drake v. Southern California Edison Company, Ltd., numbered in this court 5544-WM

Civil, were employed at either Kern River No. 1 or Borel Hydro Station, other than the plaintiff M. H. Huntington. Affiant states, however, that said plaintiff Huntington and every other hydro station attendant or apprentice attendant employed at either Kern River No. 1 or Borel Hydro Station was paid a definite monthly salary and was not paid anything in addition thereto for the standby time required of him as hereinbefore defined, and that there was no contract or custom to pay otherwise for such standby time. He was paid time and a half, however, whenever he reported performing work in excess of forty hours per week, reporting any active service which he was called upon to perform between shifts as overtime.

During the period that said hydro station attendants worked six days a week instead of five, each station attendant, including each plaintiff employed in that capacity, customarily reported eight hours of overtime for each such sixth day worked, and no additional [314] overtime unless he performed some active emergency work which was reflected on the time report as overtime in addition to the eight hours shown.

The hydro apprentice attendants usually and normally performed the same work as the hydro station attendants, except that they would be under the supervision of a trained attendant until the apprentice was considered to be duly qualified, and live upon the Company's property, and were permitted to have their families live with them, and, as far as I know, each said apprentice did have his family living with him.

(2) Head Works Tenders.

Employees of the head works tender classification usually were drawn from our utility crews, and quite often were older men transferred from maintenance crews at their request because of seeking lighter duty jobs. Occasionally, however, some were hired for that purpose directly, and in such cases they usually were local residents of the community.

Head works tenders were required to live within fifteen to twenty minutes' walking distance from their homes to the head works, and also were not permitted to live where the road thereto might be so obstructed in case of stormy weather as to make their walking or other means of travel to the head works any longer. This usually resulted, of necessity, in living in a Company house, which the employee rented from the Company, and was privileged to have any member of his family live with him.

The normal duties of a head works tender would be to attend to and operate equipment installed at intakes of hydro plants for control of water flow, patrol water-flow lines to inspect for leaks, breaks and general conditions, service and lubricate gate mechanism, clean trash rack and sluice sand; maintain yard and local trails, make simple oral reports of weather, flow conditions and related work [315] as required. These duties would normally take from four to eight hours a day, depending upon the location of their work. However, at Kaweah No. 1, the plaintiff Griffes' duties would normally take him between seven and eight hours per day.

In addition to their active duties hereinbefore described, each head works tender, including each plaintiff employed in that capacity, when not engaged in any of the active

duties hereinbefore described, was free to indulge in any activity which he desired except that until the head works at which the attendant was employed was placed on a shift basis, on certain days during the week he was expected to remain sufficiently near his residence as to be within hearing of an alarm bell in case he was needed for emergency service, unless he obtained permission from the station chief to leave the vicinity. The station chiefs usually granted permission when requested, for a head works tender to leave his residence unless conditions were such as to indicate the probabilities of requiring emergency service. For brevity of designation, the requirement of the head works tender when not engaged in active duty to remain sufficiently near his residence to hear an alarm bell will be referred to as "standby time." On or about September 14, 1945, the Florence Lake head works, Huntington Lake head works and Shaver Lake head works were placed on a shift basis, thereafter defendant's other head works were from time to time placed on a shift basis as set out and shown on Exhibit "A" attached hereto and made a part of this affidavit. On and after any head works was placed on shift basis, the head works tender at said location worked an eight hour shift five days a week. At the end of his shift he was free to do what he pleased, go where he pleased without any restraint whatever. In case an emergency occurred after the expiration of his shift and which required the services of the head works tender, he would be called and if he responded to said call, he was paid not less than time and a half for time he reported [316] as having worked in response to said call.

During all of the times mentioned herein, each and every head works tender, including each and all of the plaintiffs employed in that capacity, has made his own

time reports upon forms furnished by the Company, and the only records which the Company has, or has ever had, of hours worked by each said head works tender, including each said plaintiff employed in said capacity, are based on their said time reports. In said time reports each and every head works tender, including each and all of the plaintiffs employed in that capacity, has never reported any standby time as overtime, and each of the said head works tenders, including each of the plaintiffs employed in such capacity, at all times herein mentioned, has customarily reported not less than eight hours of work for any day on which he reported working, notwithstanding the fact that, as aforesaid, on a great many days his active duties would occupy less than eight hours of work, and the said time reports of the said head works tenders, including those of each plaintiff, have been accepted by the Company on the theory that the standby time and the active duties were the equivalent of a job not exceeding eight hours of work; in other words, that the said head works tenders, the same as the hydro station attendants, were employed to do a certain job which involved the performance of active duties, and during certain days of the week, standby time, as said term is hereinbefore defined, and for that job as a whole they were paid and accepted a fixed monthly salary payable semi-monthly up until July 1, 1947, from and after which they have been paid a weekly salary, and at all times mentioned herein from and after May 1, 1941, have been paid not less than time and a half for any work reported in excess of forty hours per week.

None of the said head works tenders, including the plaintiffs employed in that capacity, have ever been paid

anything in addition to their monthly or weekly salary for standby time as [317] hereinbefore defined, and there has been no contract, oral or written or otherwise, at any time to pay said head works tenders, or any of them, including any of the plaintiffs employed in that capacity, anything in addition to the monthly and weekly salary for such standby time; nor has there been any custom or practice at any of the places where the head works tenders were employed or resided to pay anything in addition to the said monthly or weekly salary for standby time. From and after May 1, 1941, each and every head works tender, including each and every plaintiff employed in that capacity, in addition to his monthly salary, has been paid not less than time and a half for any services reported to have been performed in excess of forty hours per week, the head works tenders computing and reporting the amount of time worked in the same manner precisely as the said hydro station attendants, as hereinbefore set out.

None of the plaintiff head works tenders, including any of the plaintiffs employed in that capacity, at any time have been paid any compensation other than their said monthly salary and not less than time and a half for any services reported by them in excess of forty hours per week, and during the time the said head works tenders, including each of the plaintiffs, were employed for six days a week, they customarily reported eight hours of overtime regardless of whether they actively performed eight hours of service and did not report any other overtime unless performing some emergency services, as hereinbefore set forth and explained.

G. R. WOODMAN

Subscribed and sworn to before me this 13th day of
October, 1947.

(Seal)

DOROTHY M. HAWKINS

Notary Public in and for the County of Los
Angeles, State of California.

My commission expires December 16, 1950.

EXHIBIT "A"

Standby Elimination
Hydro Generation Division

<u>Location</u>	<u>Date Standby Eliminated</u>
Kern River No. 3 Hydro Plant	10-27-45
Kern River No. 1 Hydro Plant	2-16-46
Kaweah Hydro Plants	4-1-46
San Antonio Canyon Hydro Plants	6-12-46
Borel Hydro Plant	6-15-46
Mill Creek Canyon Hydro Plants	7-22-46
Tule River Hydro Plant	9-1-46
Lytle Creek Canyon Hydro Plants	1-1-47
Santa Ana Canyon Hydro Plants	5-1-47
Florence Lake Headworks	9-14-45
Huntington Lake Headworks	9-14-45
Shaver Lake Headworks	9-14-45
Tule River Headworks	5-1-46
Kaweah No. 1 Headworks	5-15-46
Kaweah No. 3 Headworks	5-15-46
Borel Headworks	7-1-46
Mill Creek No. 3 Headworks	7-22-46
Kern River No. 3 Headworks	8-1-46
Kern River No. 1 Headworks	8-9-46
Lytle Creek Headworks	12-6-46
Santa Ana No. 1 Headworks	5-1-47

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith,
Clerk. [319]

[Title of District Court and Cause]

AFFIDAVIT OF J. A. STELLERN

State of California

County of Los Angeles—ss.

J. A. Stellern, being first duly sworn, deposes and says:

I am a citizen of the United States and a resident of the County of Los Angeles, State of California, residing at 112 North New Hampshire, in the City of Los Angeles. I am now in private practice for myself in Labor Relations.

In 1933 I entered the employment of the Government of the United States as Director of the United States Employment Service for the State of California. After four years of employment with the Employment Service I was transferred to the Social Security Board. In the month of May, 1940, I was transferred to the Wage-[320] Hour Public Contracts Division of the United States Department of Labor as Manager for Southern California and the State of Arizona. I remained in that position until November, 1946, when I resigned to enter private practice. My office as Manager of the Wage-Hour Public Contracts Division was in Los Angeles. I reported to the Regional Director of the Administrator of the Fair Labor Standards Act, whose office was in San Francisco.

It was my duty as the deputy of the Administrator of the Act and Manager of the Wage-Hour Public Contracts Division to endeavor to obtain as much compliance by em-

ployers with the Act as possible. It was our practice to inspect as many employers as possible and, where we found any employer indulging in a practice that we thought violative of the act, to call his attention to it and to bring about a correction. If he refused to correct it, it was my duty then to bring the case immediately to the attention of the attorney for my Division to have either a civil or criminal proceeding instituted.

It was, of course, a physical impossibility to inspect all employers in an area as large as this, but we tried to inspect all of the larger employers, and the Edison Company was inspected by Mr. Harold Perkins. The records of the Division not being open to me, I could not be certain of the date, but my best recollection is it was in April or May of 1941. In any event, I know that it was a short time prior to the broadcast between Mr. Mullendore and myself which was on June 5, 1941.

After completing his review of the records of the Edison Company, Mr. Perkins reported to me that in his opinion the Company was acting in full compliance with the Act. I remember distinctly that he and I discussed the Company's method of payment to their so-called resident employees, that is, those who were required to stay twenty-four hours a day for a certain number of days each week either at power-houses, station-houses or substations, and he and I decided that its method of payment was in compliance with the Act.

The broadcast which I have heretofore referred to was ar- [321] ranged by me. I have read a copy of the affidavit of Mr. Mullendore heretofore filed, and state that

he is in error in assuming the broadcast was suggested or arranged by the Chamber of Commerce. The idea of the broadcast had been suggested by Mr. Chambers who came here from Washington, and was a public relations man for the Administrator. He and I discussed it, and he thought it would be a good idea as being informative to employers and employees alike, and it was decided on. I arranged for the broadcast, the time for which was given free to the Division by the Broadcasting Company. The script was prepared in my office by Mr. Chambers and revised by me. Actually, I think Mr. Chambers wrote the script.

I had selected Mr. Mullendore as the man to ask the questions, not because he was connected with the Edison Company, but because he was at that time President of the State Chamber of Commerce. I informed Mr. Chambers, however, that Mr. Mullendore's Company had been examined and had been found to be operating in full compliance with the Act, and the statement in the script of the broadcast, "I am happy to be able to tell you that your Company was one of those whose records were inspected in this current program, and we found that you are operating in complete compliance with the Act", was written into the script by Mr. Chambers from information which I had supplied to him, which, in turn, was based on the report which Mr. Perkins had made to me. While I cannot remember the details of it now, I do remember that Mr. Perkins and I had discussed the situation in detail, and that both of us had reached the conclusion that the Company in all of its departments was operating

in compliance with the Act. The broadcast was given on the 5th day of June, 1941, from 6:45 P. M. to 7:15 P. M., as per the script which had been prepared, and a copy of which is attached to this affidavit as Exhibit "A" and made a part hereof.

Naturally, before going on the air, I went over the script with Mr. Mullendore. [322]

The Edison Company was again inspected under my direction I believe in 1943. That inspection was made as a result of a complaint which we received. The files of the Division no longer being available to me, I cannot state other than my best recollection. I cannot now recall whether the complaint came from a union or from some individual, but as I recollect, the complaint was based on the fact that resident employees were not receiving proper overtime. Mr. Harold Perkins again made the inspection, and he and I talked it over again and, as I remember, at that time we reached the definite conclusion that the Edison Company's method of compensating employees did not violate the Act.

Further deponent saith not.

J. A. STELLERN

Subscribed and sworn to before me this 8 day of October, 1947.

(Seal)

C. E. CULVER

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires June 29, 1950. [323]

EXHIBIT "A"

U. S. Department of Labor
Wage and Hour Division
Los Angeles, California

Radio Program Presented by Mr. William C. Mullendore, Executive Vice-President of the Southern California Edison Company, and Chairman of the Statewide Industrial Committee of the California State Chamber of Commerce, and Mr. John A. Stellern, Southern California Manager, Wage and Hour Division, U. S. Dept. of Labor, Over Radio Station KFWB, Hollywood, California, Thursday June 5, 1941, From 6:45 P. M. to 7:00 P. M.

Announcer: The program which follows comes to you under the auspices of the Wage and Hour Division of the U. S. Department of Labor. Speakers are Mr. William C. Mullendore, Executive Vice-President of the Southern Calif. Edison Company, and Chairman of the Statewide Industrial Committee of the California State Chamber of Commerce, and Mr. John A. Stellern, Southern California Manager of the Wage and Hour Division. Mr. Mullendore—

Mullendore: Good evening, Ladies and Gentlemen. All of you are familiar with the general objectives of the Fair Labor Standards Act, commonly known as the Federal Wage and Hour Law. This Act was passed by the Congress in 1938, and provides that no worker employed in interstate commerce, or in the production of goods [324] for interstate commerce, shall be paid less than 30¢ an hour, and that after 40 hours have been worked in any workweek, that he shall receive overtime at the rate of one and one-half times his regular hourly wage. Mr.

Stellern tells me that when the Act was passed there was naturally a flood of complaints. For more than 18 months after it became effective on October 24, 1938, the inspection staff was inadequate to keep up with the complaint load. Consequently, a back log of complaints developed. In California at one time there were more than 2000 complaints which the Division had been unable to investigate. Within the past month the Wage and Hour Division has concentrated on cleaning up these old complaints. More than 400 employers in Los Angeles have been called to the Division offices with their records. I shall now ask Mr. Stellern some questions concerning the results of this special program of compliance. Mr. Stellern, among these 400 employers, how many were found to be in serious violation of the Act?

Stellern: I am happy to tell you, Mr. Mullendore, that indications are that only 117, or approximately one-fourth, of these old cases show indications that restitution will have to be paid.

Mullendore: Approximately how many employees are involved in those cases?

Stellern: There are 2470 employees in the 117 establishments.

Mullendore: How many of them will have to make payments of restitution?

Stellern: Every one of them.

Mullendore: Well, just about how much will that amount to in round figures? [325]

Stellern: Our preliminary computations—you understand, of course, that we shall have to make plant inspections in 109 of these cases—show that \$50,700.00 is due these 2470 employees.

Mullendore: What about these other 290 cases, Mr. Stellern?

Stellern: Many of them were found not to be engaged in interstate commerce, or in the production of goods for commerce, Mr. Mullendore. For instance, there was one man who conducts a strictly retail business. Our inspection of his books disclosed that for more than a year he has strictly complied with the law, under the impression that his employees were covered by its provisions.

Mullendore: Well, did you find any who sincerely thought they were not covered who were in violation?

Stellern: Yes, sir. I recall one at the moment. This was a small firm manufacturing and repairing automobile batteries for local use. The proprietor was sure that he did not come under the Act. However, our inspection of his books disclosed that the dollar volume of junk lead which he sold in interstate commerce exceeded his sales of batteries.

Mullendore: Among these violations, Mr. Stellern, do you find many who are deliberate in their attempts to evade the Act.

Stellern: A very small percentage. In fact, taking the nation as a whole, we have found that most American business men want to be fair in their dealings with their employees. More than 85% of the cases now marked "Closed" in our files are there from private settlement, rather than the necessity of litigation. Then, of course, there are some who are so convinced that they are not covered by the Act that they are willing to take the [326]

case to court. We have no quarrel with this element, particularly if we are convinced of their sincerity. The element to whom we give no consideration is that 3% or 4% which you will find in any industry who are willing to take competitive advantage at the expense of their workers' pay envelopes. This is the element which falsifies records, which in some cases have actually maintained two sets of books—one for the Wage and Hour Inspector, and one for the actual plant records.

Mullendore: How do you uncover such tactics?

Stellern: Usually we know something about such a concern from the complaint, or we certainly develop it in our interviews with employees. You understand when we call these employers down to our office with their records, we do not close the case merely after talking to them. We confirm what they say by interviewing their employees. If there is any discrepancy in the statements of the employer and the employee, we make a thorough plant inspection which usually develops the truth.

Mullendore: Are there not some exemptions under the Act, Mr. Stellern?

Stellern: Yes, sir. Congress specifically exempted several classes of employees. For instance, farmers are completely exempt from both the wage and hour provisions of the Act. Likewise, employees of purely retail or local service establishments are exempt.

Mullendore: Just how do you define a retail establishment?

Stellern: A retail establishment is a store or service station which makes a retail sale to an individual for his use, that is the ultimate consumer. For instance, grocery [327] stores, department stores, local hardware stores, we regard as retail establishments.

Mullendore: What about service establishments?

Stellern: Well, we would regard a restaurant, a laundry, or local gasoline service station, or a hotel as a service establishment.

Mullendore: Well, how would you classify, for instance, radio stations?

Stellern: A radio station is engaged in interstate commerce. It sends out over the air music, news and advertisements. You see, Mr. Mullendore, interstate commerce is defined in the Fair Labor Standards Act as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." For instance, in your company you bring electrical power from outside the State and distribute it. Every employee engaged in that phase of your business is entitled to all the benefits of the Act. I am happy to be able to tell you that your company was one of those whose records were inspected in this current program, and we found that you are operating in complete compliance with the Act.

Mullendore: Well, Mr. Stellern, generally speaking, how does Southern California compare with other sections of the Country in relation to the Fair Labor Standards Act?

Stellern: Our office here, Mr. Mullendore, is part of Region 15, which includes the States of Washington, Oregon, California, Arizona, Nevada, Utah and Idaho. Of course, Southern California is the most densely populated area in the Region. Also, I am reluctant to tell you, in numerous industries here the wage levels are not as [328] high as they are even in Northern California and other sections for the same type of work. Many of these, of course, are in the sweated industries, such as garment making. The fact remains, however, that almost 50% of the complaints received in Region 15 came from Southern California.

Mullendore: Mr. Stellern, what is the policy of the Wage and Hour Division in bringing about mass compliance in such a situation as you describe in Southern California?

Stellern: We seek voluntary compliance from employers, Mr. Mullendore. I am glad you give me this opportunity to state that in this special program, as well as generally, we are not conducting a punitive campaign against employers. General Philip B. Fleming, Administrator of the Wage and Hour Division, has frequently said that if he started out to enforce this Act he would need an army of 10,000 inspectors. We have less than 10% of that number throughout the United States, Hawaii and Alaska, which, by the way, are also in Region 15. We therefore seek the cooperation of employers. We assume that they intend to obey the Act and we give them every opportunity to come into compliance. The only

type of employer who will not find us cooperative is one who falsifies his records or is defiant and wilful in his violations. We usually refer that type to the Legal Branch for either criminal or civil procedure.

Mullendore: Well now, Mr. Stellern, do you take sides between an employer and an employee.

Stellern: No, sir, we are only after the facts. We are not organizers for unions, nor do we preach the philosophy that the employer is always right. Rather, we go [329] down the middle of the road and try to get the facts. An employer seeking information concerning his responsibilities under the Act is just as welcome in my office as an employee who is a victim of an unfair employer.

Mullendore: Thank you very much, Mr. Stellern. You have answered several questions which have been on my mind, and I feel they are similar to questions in the minds of many employers in this area.

Announcer: The program to which you have just listened was presented by Mr. William C. Mullendore, Executive Vice-President of the Southern California Edison Company, and Chairman of the Statewide Industrial Committee of the California State Chamber of Commerce, and Mr. John A. Stellern, Southern California Manager of the Wage and Hour Division, U. S. Department of Labor. [330]

Received copy of the within Affidavits of G. R. Woodman, E. N. Husher, C. E. Pichler, and J. A. Stellern, in support of defendant's Motion for Summary Judgment this 22nd day of October 1947. Elizabeth Watson for David Sokol, Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith, Clerk. [331]

[Title of District Court and Cause]

INTERROGATORIES PROPOUNDED BY
DEFENDANT TO PLAINTIFFS

To the Plaintiffs in the Above Entitled Action, and to
David Sokol, Esq., Their Attorney:

Please furnish written answers, under oath, to the
following interrogatories:

Interrogatories Numbered 1 Through 28, Immediately Following, Are Applicable Only to the Plaintiffs Who Are Alleged in Paragraph III of the First Cause of Action in the Third Amended Complaint to Have Been Employed by the Defendant as Primary [332] Service Men; and the Use of the Word Plaintiffs in Said Interrogatories is Intended to be Limited Accordingly.

Interrogatory No. 1:

Were any of the plaintiffs Paul W. Cockrell, J. D. Borden, John M. Smith, W. H. Culbertson, A. L. Honnell, L. A. Phinney and Clarence C. Prinslow during any of the times of their employment as primary service men on and after March 19, 1942, employed except upon a scheduled eight hour shift for each day of their employment?

The foregoing question does not deal with or require an answer as to overtime of any nature, if any, but simply as to whether the employment of any one of said plaintiffs was on other than a definite eight hour shift for each day he worked.

Interrogatory No. 2:

If the answer to the foregoing Interrogatory No. 1 is that any of the plaintiffs named in said interrogatory at any time on or after March 19, 1942, were employed on other than a scheduled eight hour shift for each day worked, state which of said plaintiffs was so employed, the station or place at which he was so employed, and the conditions of his employment so far as time and method of his work were concerned.

Interrogatory No. 3:

Was any service ever required of the plaintiffs Paul W. Cockrell, J. D. Borden, A. L. Honnell and Clarence C. Prinslow, or any of them, during any of the times they were employed from and after March 19, 1942, as primary service men, after the end of their eight hour shift, other than the performance of emergency services, as that term is defined in the answer to the third amended complaint, and other than being required on certain days of the week in case they did not go [333] home after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency?

Interrogatory No. 4:

If the foregoing Interrogatory No. 3 is answered in the affirmative, state names of said plaintiffs from whom any service was required after the end of their eight hour shift, other than emergency services as defined in the answer to the third amended complaint, and other than being required on certain days of the week, in case they did not go home after the end of their shift, or after

going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency; and state the character of such service.

Interrogatory No. 5:

Was any service ever required of the plaintiffs W. H. Culbertson, John M. Smith, and L. A. Phinney during any of the times they were employed as primary service men from and after March 19, 1942, after the end of their eight hour shift, other than the performance of emergency services as that term is defined in the answer to the third amended complaint and other than being required on certain days of the week if at home to answer in their own homes direct telephone calls of complaints from customers and, in case they did not go home after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency? [334]

Interrogatory No. 6:

If the foregoing Interrogatory No. 5 is answered in the affirmative, please state the names of said plaintiffs from whom any service was required after the end of their eight hour shift, other than the performance of emergency services as defined in the defendant's answer to the third amended complaint, and other than being required on certain days of the week if at home to answer in their own homes direct telephone calls or complaints from customers and, in case they did not go home after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency; and state the character of such service.

Interrogatory No. 7:

Have all of the plaintiffs named in the foregoing Interrogatory No. 1 at all times from and after March 19, 1942, and until July 1, 1947, received a monthly salary payable semi-monthly, and thereafter a weekly salary?

Interrogatory No. 8:

In addition to the above salary, have not all of the plaintiffs named in the foregoing Interrogatory No. 1 at all times from and after March 19, 1942, received not less than time and a half for any and all emergency services, as said term is defined in the answer to the third amended complaint, which they reported on their time cards as having performed after the end of their eight hour shift?

Interrogatory No. 9:

If the foregoing Interrogatory No. 8 is answered in the negative, state what plaintiff or plaintiffs have reported emergency [335] services, as said term is defined in the answer to the third amended complaint, for which such plaintiff or plaintiffs reporting such emergency service have not been paid not less than time and a half.

Interrogatory No. 10:

During the time that any of the said plaintiffs named in the foregoing Interrogatory No. 1 were required to work six days a week, did not each and all of them receive not less than time and a half for eight hours of service on said sixth day plus not less than time and a half for any emergency service reported by them as having been performed during the nighttime hours of said sixth day, as said terms emergency service and nighttime hours are defined in the answer to the third amended complaint?

Interrogatory No. 11:

Have any of the plaintiffs named in the foregoing Interrogatory No. 1 during any of the times from and after March 19, 1942, ever been paid any compensation whatever other than said monthly or weekly salary and not less than time and a half for eight hours on the sixth day when they worked six days a week, and for emergency services which they reported as performing after the end of their eight hour shift, as said term emergency services is defined in the answer to the third amended complaint, and bonuses in case they detected meter tampering or reported prospective customers for purchases of electrical appliances, and also for vacation pay and pay on sick leave?

Interrogatory No. 12:

If the foregoing Interrogatory No. 11 is answered in the affirmative, state the names of the plaintiffs who have ever received any compensation, other than their monthly or weekly salary and not less than time and a half for eight hours for the sixth day when they [336] worked six days a week, and for emergency services, as said term emergency services is defined in the answer to the third amended complaint, which they reported having performed, and bonuses in case they detected meter tampering or reported prospective customers for purchases of electrical appliances; and state the amounts of such payments to each such plaintiff and the character of the work or services, for which the payments were made.

Interrogatory No. 13:

Have the plaintiffs Paul W. Cockrell, J. D. Borden, A. L. Honnell and Clarence C. Prinslow, or any of them, ever been paid anything whatever for being required, during certain days of the week, in case they did not go

home after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency

Interrogatory No. 14:

In case the foregoing Interrogatory No. 13 is answered in the affirmative, state the names of the plaintiffs who have been so paid, the times when they received payment for being required, during certain days of the week, in case they did not go home after the end of the shift, or after going home left their homes, to advise the switching center where they could be reached by telephone, the number of such payments to each such plaintiff, and the amounts thereof.

Interrogatory No. 15:

Have the plaintiffs Paul W. Cockrell, J. D. Borden, A. L. Honnell and Clarence C. Prinslow, or any of them, ever had any contract or agreement that they were to be paid anything for being required on certain days of the week, in case they did not go home after the end of their shift, or after going home left their homes, [337] to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency?

Interrogatory No. 16:

If the foregoing Interrogatory No. 15 is answered in the affirmative, state whether the agreement or contract was oral or written, and, if written, attach a copy of the same to your answer; if oral, state the substance of the said oral agreement and when and by whom it was made on behalf of the defendant.

Interrogatory No. 17:

Was there any custom or practice of defendant company to pay the plaintiffs Paul W. Cockrell, J. D. Borden, A. L. Honnell and Clarence C. Prinslow, or any of them, any compensation for being required on certain days of the week, in case they did not go home after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency?

Interrogatory No. 18:

If the foregoing Interrogatory No. 17 is answered in the affirmative, state fully of what the custom consisted and of what the practice consisted.

Interrogatory No. 19:

Have the plaintiffs Paul W. Cockrell, J. D. Borden, A. L. Honnell and Clarence C. Prinslow, or any of them, ever made any demand, oral or written (other than bringing or joining in this suit), upon the defendant for the payment of any amount because of being required on certain days of the week, in case they did not go home [338] after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency?

Interrogatory No. 20:

If the foregoing Interrogatory No. 19 is answered in the affirmative, state fully what demands were made, the plaintiffs by whom they were made, the date or dates of such demand or demands, and to whom they were made; and if the demands were in writing attach a copy of such writing, if oral, state the substance thereof.

Interrogatory No. 21:

Have the plaintiffs W. H. Culbertson, John M. Smith and L. A. Phinney, or any of them, ever had any contract or agreement that they were to be paid anything for being required on certain days of the week if at home to answer in their own homes direct telephone calls or complaints from customers and, in case they did not go home after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency?

Interrogatory No. 22:

If the foregoing Interrogatory No. 21 is answered in the affirmative, state whether the agreement or contract was oral or written, and if written, attach a copy of the same to your answer; if oral, state the substance of the said oral agreement and when and by whom it was made on behalf of the defendant.

Interrogatory No. 23:

Was there any custom or practice of defendant to pay the [339] plaintiffs W. H. Culbertson, John M. Smith and L. A. Phinney, or any of them, any compensation for being required on certain days of the week if at home to answer in their own homes direct telephone calls or complaints from customers and, in case they did not go home after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency?

Interrogatory No. 24:

If the foregoing Interrogatory No. 23 is answered in the affirmative, state fully of what the custom consisted and of what the practice consisted.

Interrogatory No. 25:

Have the plaintiffs W. H. Culbertson, John M. Smith and L. A. Phinney, or any of them, ever made any demand oral or written (other than bringing or joining in this suit) upon the defendant for payment of any amount because of being required on certain days of the week if at home to answer in their own homes direct telephone calls or complaints from customers and, in case they did not go home after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency?

Interrogatory No. 26:

If the foregoing Interrogatory No. 25 is answered in the affirmative, state fully what demands were made, the plaintiffs by whom they were made, the date or dates of such demand or demands and to whom they were made; and if the demands were in writing attach a copy of such writing, if oral, state the substance thereof. [340]

Interrogatory No. 27:

At the time each of the said plaintiffs named in Interrogatory No. 1 was employed as or entered upon the duties of a primary service man, was he not informed in substance that he would be required to work a daily eight hour shift for five days a week (and six days while the forty-eight hour week was required by law), that on certain days during the week at the end of said shift if he did not go home, or after returning to his home he desired to leave the same, he would be required to notify the switching center of a telephone number where he could be reached in case his services were required in the event of an emergency, and were not the plaintiffs W. H. Culbertson, John M. Smith, and L. A. Phinney also advised

that in addition their names would be listed in the telephone book and that on certain days of the week when they were at home they would be required to accept direct telephone calls or complaints from customers, and were not each of said plaintiffs named in Interrogatory No. 1 also then informed that they would receive nothing in addition to a specified monthly salary for all of the foregoing services and requirements?

Interrogatory No. 28:

If the foregoing Interrogatory No. 27 was answered in the negative, list which of said plaintiffs was not so informed and state further what said listed plaintiffs were told with regard to the matters set forth in said Interrogatory No. 27. [341]

Interrogatories Numbered 29 Through 65 Immediately Following, Are Applicable Only to the Plaintiffs Who Are Alleged in Paragraph III of the First Cause of Action in the Third Amended Complaint to Have Been Employed by the Defendant as Substation Operators and Attendants or Relief Operators and Attendants: And the Use of the Word Plaintiffs in Said Interrogatories Is Intended to Be Limited Accordingly.

Interrogatory No. 29:

From and after March 19, 1942, have any of the said plaintiffs ever been paid any compensation other than a monthly salary payable semi-monthly (or weekly salary after July 1, 1947) and not less than time and a half for all emergency service reported by them as having been performed during nighttime hours as said terms emergency service and nighttime hours are defined in the answer to the third amended complaint?

Interrogatory No. 30:

If the foregoing Interrogatory No. 29 is answered in the affirmative, state the plaintiffs who were paid any such compensation, the dates and amounts of such payments, and the services for which they were paid.

Interrogatory No. 31:

From and after March 19, 1942, did all of the said plaintiffs make out their own time reports?

Interrogatory No. 32:

If the answer to the foregoing Interrogatory No. 31 is in [342] the negative, state which of said plaintiffs did not make out their own time reports.

Interrogatory No. 33:

From and after March 19, 1942, did all of the said plaintiffs customarily report eight hours of work upon every day on which they reported as working?

Interrogatory No. 34:

If the answer to the foregoing Interrogatory No. 33 is in the negative, state which of said plaintiffs did not customarily report eight hours upon any day upon which he reported as working, the dates when he reported less than eight hours, and the conditions under which he reported less than eight hours for any day worked.

Interrogatory No. 35:

From and after March 19, 1942, did any of the said plaintiffs ever report any overtime except for emergency service performed during the nighttime hours, as said terms emergency service and nighttime hours are defined in the answer to the third amended complaint?

Interrogatory No. 36:

If the answer to the foregoing Interrogatory No. 35 is in the affirmative, state the character of the overtime reported, the dates and amounts thereof, and the plaintiffs by whom the same was reported.

Interrogatory No. 37:

Other than the filing or joining in of this suit, did any of the said plaintiffs ever make any demand upon the defendant for any compensation other than their monthly or weekly salary and overtime for emergency service reported by them as having been [343] performed during the nighttime hours, as said terms emergency service and nighttime hours are defined in the answer to the third amended complaint?

Interrogatory No. 38:

If the answer to the foregoing Interrogatory No. 37 is in the affirmative, state fully what demands were made, the plaintiffs by whom they were made, the date or dates of such demand or demands, and to whom they were made; and if the demands were in writing, attach a copy of such writing; if oral, state the substance thereof.

Interrogatory No. 39:

During the time that the Substation Division was Operating on six days a week, did not each of the said plaintiffs report not less than eight hours of overtime for the said sixth day they worked?

Interrogatory No. 40:

If said Interrogatory No. 39 is answered in the negative as to any of the said plaintiffs, state which of said plaintiffs did not report at least eight hours of overtime for said sixth day worked, and the dates and conditions under which he reported less than eight hours of overtime for said sixth day worked.

Interrogatory No. 41:

Did any of the said plaintiffs ever report more than eight hours of overtime for the sixth day they worked unless they had performed emergency service during the nighttime hours as the terms emergency service and nighttime hours are defined in the answer to the third amended complaint? [344]

Interrogatory No. 42:

If the answer to the foregoing Interrogatory No. 41 is in the affirmative, state the dates and character of the overtime reported and by what plaintiffs.

Interrogatory No. 43:

Did any of the said plaintiffs have any contract, written or oral, that they should be paid anything other than their monthly or weekly salary for being required during five days a week (and six days a week when the Substation Division was operating upon a 48-hour week) to remain so near to the substation or their residence as to be able to hear and respond to an alarm bell in case their services were needed?

Interrogatory No. 44:

If the foregoing Interrogatory No. 43 is answered in the affirmative, state what was the nature of the contract, whether written or oral, and if written, attach a copy of it; and if oral, state the substance thereof and when and by whom it was made on behalf of the defendant.

Interrogatory No. 45:

Was there any custom or practice of defendant to pay the said plaintiffs or any of them any compensation other than their monthly or weekly salary for being required during five days a week (and six days a week when the Substation Division was operating upon a 48-hour week)

to remain so near to the substation or their residence as to be able to hear and respond to an alarm bell in case their services were needed?

Interrogatory No. 46:

If the foregoing Interrogatory No. 45 is answered in the affirmative, state fully of what the custom consisted and of what the practice consisted. [345]

Interrogatory No. 47:

What were the active duties of the plaintiff substation operators and attendants?

Interrogatory No. 48:

Approximately how long each day did it require for the said plaintiffs to perform their active duties?

Interrogatory No. 49:

What were the active duties of the plaintiff relief operators and attendants?

Interrogatory No. 50:

Approximately how long each day did it require for the said plaintiffs to perform their active duties?

Interrogatory No. 51:

Was there any time fixed by defendant during the twenty-four hours in which the said plaintiffs were to perform their active duties as set out in answers to the foregoing Interrogatories Nos. 47 and 49?

Interrogatory No. 52:

If you answer the foregoing Interrogatory No. 51 in the affirmative, state the hours in which their said active duties were required to be performed.

Interrogatory No. 53:

Did the plaintiffs or any of them understand that they were employed to work a definite scheduled eight hour daily shift? [346]

Interrogatory No. 54:

If the answer to the foregoing Interrogatory No. 53 is in the negative, state upon what basis the said plaintiffs customarily reported eight hours of work for each day on which they reported working and no overtime except for emergency service performed during the nighttime hours, as said terms emergency service and nighttime hours are defined in the answer to the third amended complaint.

Interrogatory No. 55:

What did plaintiffs understand said "reported eight hours" referred to in Interrogatory No. 54, to represent?

Interrogatory No. 56:

If the answer to the foregoing Interrogatory No. 53 is in the affirmative, did the said plaintiffs or any of them understand that their monthly or weekly salary which was paid to them was paid only for such eight hour daily shift?

Interrogatory No. 57:

If the answer to the foregoing Interrogatory No. 56 is in the affirmative, list the names of the plaintiffs who understood that their monthly or weekly salary which was paid to them was paid only for such eight hour daily shift.

Interrogatory No. 58:

Did the plaintiffs or any of them understand that their monthly or weekly salary was payment for anything other than their active duties? [347]

Interrogatory No. 59:

If the foregoing Interrogatory No. 58 is answered in the affirmative, state what other services than their active duties they understood were to be compensated for by their monthly or weekly salary.

Interrogatory No. 60:

From and after March 19, 1942, did plaintiffs or any of them receive any compensation other than their monthly or weekly salary for being required during five days a week (and six days a week when the Substation Division was operating upon a 48-hour week) to remain so near to the substation or their residence as to be able to hear and respond to an alarm bell in case their services were needed?

Interrogatory No. 61:

If the foregoing Interrogatory No. 60 is answered in the affirmative, state which of said plaintiffs received any such compensation, and state of what such compensation consisted and how it was computed.

Interrogatory No. 62:

Was not each of the said plaintiffs told when he was employed as or entered upon the duties of a substation operator and attendant or relief operator and attendant that he would be required during five days of the week (and six days a week when the Substation Division was operating on a 48-hour week) to remain so close to the substation or his residence as to be able to hear and respond to an alarm bell in case his services were needed? [348]

Interrogatory No. 63:

If the foregoing Interrogatory No. 62 is answered in the negative, list which of said plaintiffs were not so in-

formed, then state further what said list of plaintiffs were told with regard to the matters set forth in Interrogatory No. 62.

Interrogatory No. 64:

Was not each of the said plaintiffs told when he was employed as or entered upon the duties of a substation operator and attendant or relief operator and attendant that he would receive a specified monthly or weekly salary?

Interrogatory No. 65:

If the foregoing Interrogatory No. 64 is answered in the negative, list which of said plaintiffs were not so informed and state further what said list of plaintiffs were told with regard to the matters set forth in Interrogatory No. 64.

Interrogatories Numbered 66 Through 93 Immediately Following, Are Applicable Only to the Plaintiffs Who Are Alleged in Paragraph III of the First Cause of Action in the Third Amended Complaint to Have Been Employed by the Defendant as Hydro Station Attendants or Apprentice Attendants; and the Use of the Word Plaintiffs in Said Interrogatories Is Intended to Be Limited Accordingly.

Interrogatory No. 66:

From and after March 19, 1942, have any of the said plaintiffs ever been paid any compensation other than a monthly salary payable semi-monthly (or weekly salary after July 1, 1947) [349] and not less than time and a half for all work reported by them as having been performed in excess of forty hours per week?

Interrogatory No. 67:

If the foregoing Interrogatory No. 66 is answered in the affirmative, state the plaintiffs who were paid any such compensation, the times and amounts of such payments, and the services for which they were paid.

Interrogatory No. 68:

From and after March 19, 1942, did all of the said plaintiffs make out their own time reports?

Interrogatory No. 69:

If the answer to the foregoing Interrogatory No. 68 is in the negative, state which of said plaintiffs did not make out their own time reports.

Interrogatory No. 70:

From and after March 19, 1942, did any of the plaintiffs ever report less than eight hours of work for any day upon which they reported working?

Interrogatory No. 71:

State the nature of the active duties required of the plaintiff hydro station attendants.

Interrogatory No. 72:

State the nature of the active duties required of the plaintiff hydro station apprentice attendants.

Interrogatory No. 73:

From and after March 19, 1942, was there any time fixed by [350] the defendant during the day in which the said plaintiffs were required to perform their active duties?

Interrogatory No. 74:

If the foregoing Interrogatory No. 73 is answered in the affirmative, state the hours or period of time in which the plaintiffs were required to perform their said active duties.

Interrogatory No. 75:

From and after March 19, 1942, did the plaintiffs consider that their employment contemplated the performance of their active duties in an eight hour daily shift?

Interrogatory No. 76:

If the answer to the foregoing Interrogatory No. 75 is in the affirmative, state the hours of the daily shift of each of the said plaintiffs.

Interrogatory No. 77:

State the average length of time which was required by the plaintiffs to perform their active duties.

Interrogatory No. 78:

If the answer to either Interrogatory No. 73 or No. 75 (or both) is in the negative, state upon what basis each plaintiff employed as a hydro station attendant or apprentice attendant continuously reported not less than eight hours of work for each day on which they reported working?

Interrogatory No. 79:

What did plaintiffs understand said "reported eight hours" referred to in Interrogatory No. 78 to represent? [351]

Interrogatory No. 80:

Did the plaintiffs or any of them understand that their monthly or weekly salary was payment for anything other than their active duties?

Interrogatory No. 81:

If the foregoing Interrogatory No. 80 is answered in the affirmative, state what other services than their active duties they understood were to be compensated for by their monthly or weekly salary.

Interrogatory No. 82:

From and after March 19, 1942, was there any contract or agreement to pay the plaintiffs or any of them any compensation other than their monthly or weekly salary for being required during certain days of the week to remain so near the station or their residence as to be able to hear and respond to an alarm bell in case their services were needed?

Interrogatory No. 83:

If the foregoing Interrogatory No. 82 is answered in the affirmative, state what was the contract, whether oral or in writing, and if in writing attach a copy; if oral, state the substance thereof and when and by whom it was made on behalf of the defendant.

Interrogatory No. 84:

From and after March 19, 1942, was there any custom or practice of defendant to pay the plaintiffs or any of them any compensation other than their monthly or weekly salary for being required during certain days of the week to remain so near the station or their residence as to be able to hear and respond to an [352] alarm bell in case their services were needed in the event of an emergency?

Interrogatory No. 85:

If the foregoing Interrogatory No. 84 is answered in the affirmative, state fully of what the custom consisted and of what the practice consisted.

Interrogatory No. 86:

State whether any payment was ever made to any of the plaintiffs other than their monthly or weekly salary for being required during certain days of the week to remain so close to the station or their residence as to be able to

hear and respond to an alarm bell in case their services were needed.

Interrogatory No. 87:

If the answer to the foregoing Interrogatory No. 86 is in the affirmative, state what payments were made, when they were made, and to which of said plaintiffs.

Interrogatory No. 88:

Other than either filing or joining in this suit, did any of the plaintiffs ever make any demand upon the defendant for any compensation other than the monthly or weekly salary and overtime payments heretofore received by them?

Interrogatory No. 89:

If the foregoing Interrogatory No. 88 is answered in the affirmative, state by what plaintiffs such demand was made, when and to whom, and whether written or oral; if written, attach a copy or copies of any such written demand or demands; if oral, state the substance of such demand or demands. [353]

Interrogatory No. 90:

Was not each of the said plaintiffs told when he was employed as or entered upon the duties of a hydro station attendant or apprentice attendant that he would be required during certain days of the week to remain so close to the station or his residence as to be able to hear and respond to an alarm bell in case his services were needed.

Interrogatory No. 91:

If the foregoing Interrogatory No. 90 is answered in the negative, list which of said plaintiffs were not so informed, then state further what said list of plaintiffs were told with regard to the matters set forth in Interrogatory No. 90.

Interrogatory No. 92:

Was not each of said plaintiffs told when he was employed as or entered upon the duties of a hydro station attendant or apprentice attendant that he would receive a specified monthly or weekly salary?

Interrogatory No. 93:

If the foregoing Interrogatory No. 92 is answered in the negative, list which of said plaintiffs were not so informed and state further what said list of plaintiffs were told with regard to the matters set forth in Interrogatory No. 92. [354]

Interrogatories Numbered 94 Through 119 Immediately Following, Are Applicable Only to the Plaintiffs Who Are Alleged in Paragraph III of the First Cause of Action in the Third Amended Complaint to Have Been Employed by the Defendant as Head Works Tenders and the Use of the Word Plaintiffs in Said Interrogatories Is Intended to Be Limited Accordingly.

Interrogatory No. 94:

From and after March 19, 1942, have any of the plaintiffs ever been paid any compensation other than a monthly salary payable semi-monthly (or a weekly salary after July 1, 1947) and not less than time and a half for all work reported by them as having been performed in excess of forty hours per week?

Interrogatory No. 95:

If the foregoing Interrogatory No. 94 is answered in the affirmative, state the plaintiffs who were paid any such compensation, the times and amounts of such payments, and the services for which they were paid.

Interrogatory No. 96:

From and after March 19, 1942, did all of the said plaintiffs make out their own time reports?

Interrogatory No. 97:

If the answer to the foregoing Interrogatory No. 96 is in the negative, state which of said plaintiffs did not make out their own time reports. [355]

Interrogatory No. 98:

From and after March 19, 1942, did any of the plaintiffs ever report less than eight hours of work for any day upon which they reported working?

Interrogatory No. 99:

State the nature of the active duties required of the plaintiff head works tenders?

Interrogatory No. 100:

State the average daily time it would require each of the plaintiffs to perform his active duties.

Interrogatory No. 101:

From and after March 19, 1942, was there any time fixed by the defendant during the day in which the said plaintiffs were required to perform their active duties?

Interrogatory No. 102:

If the foregoing Interrogatory No. 101 is answered in the affirmative, state the hours or period of time in which the plaintiffs were required to perform their said active duties.

Interrogatory No. 103:

From and after March 19, 1942, did the plaintiffs consider that their employment contemplated the performance of their active duties in an eight hour daily shift?

Interrogatory No. 104:

If the answer to the foregoing Interrogatory No. 103 is in the affirmative, state the hours of the daily shift of each of the said plaintiffs. [356]

Interrogatory No. 105:

Was the monthly salary until July 1, 1947, and thereafter the weekly salary received and accepted by plaintiffs or any of them in payment for their active services?

Interrogatory No. 106:

If the foregoing Interrogatory No. 105 is answered in the negative, as to any plaintiffs, state what other services were understood by said plaintiffs to be covered by said salary.

Interrogatory No. 107:

If the foregoing Interrogatory No. 105 is answered in the affirmative, state whether any compensation was ever paid to any of said plaintiffs for any inactive service or for being required on certain days of the week to remain so close to their residence as to be able to hear and respond to an alarm bell in case their services were needed.

Interrogatory No. 108:

If the foregoing Interrogatory No. 107 is answered in the affirmative, state to which of said plaintiffs such compensation was paid, when, and the amount thereof.

Interrogatory No. 109:

If the foregoing Interrogatory No. 105 is answered in the affirmative, state how and by what method work in excess of forty hours per week was computed or reported.

Interrogatory No. 110:

From and after March 19, 1942, did any of the plaintiffs ever report less than eight hours on any day on which he reported working except where after starting work he was relieved from [357] any duties before 4:30 or 5:00 o'clock p. m. because of accident, sickness, or other unusual cause?

Interrogatory No. 111:

From and after March 19, 1942, was there any contract or agreement to pay the plaintiffs or any of them any compensation other than their monthly or weekly salary for being required during certain days of the week to remain so close to their residence as to be able to hear and respond to an alarm bell in case their services were required in event of an emergency?

Interrogatory No. 112:

If the foregoing Interrogatory No. 111 is answered in the affirmative, state whether the contract was written or oral, and, if written, attach a copy; if oral, state the substance thereof and when and by whom it was made on behalf of the defendant.

Interrogatory No. 113:

In Paragraph II of the second cause of action in the third amended complaint it is alleged, "That by custom

and practice in effect at the time of employment of plaintiffs, and at the time that plaintiffs worked overtime as hereinabove set forth, all of said overtime work was compensable." (p. 9).

What was the custom or practice upon which the plaintiffs' allegations of Paragraph II of the second cause of action in the third amended complaint are based?

Interrogatory No. 114:

From and after March 19, 1942, was there any custom or practice of defendant to pay the plaintiffs or any of them any compensation other than their monthly or weekly salary for [358] being required during certain days of the week to remain so close to their residence as to be able to hear and respond to an alarm bell in case their services were required in event of an emergency?

Interrogatory No. 115:

If the foregoing Interrogatory No. 114 is answered in the affirmative, state fully of what the custom consisted and of what the practice consisted.

Interrogatory No. 116:

Was not each of said plaintiffs told when he was employed as or entered upon the duties of a head works tender that he would be required during certain days of the week to remain so close to his residence as to be able to hear and respond to an alarm bell in case his services were needed?

Interrogatory No. 117:

If the foregoing Interrogatory No. 116 is answered in the negative, list which of said plaintiffs were not so informed, then state further what said list of plaintiffs were told with regard to the matters set forth in Interrogatory No. 116.

Interrogatory No. 118:

Was not each of said plaintiffs told when he was employed as or entered upon the duties of a head works tender that he would receive a specified monthly salary?

Interrogatory No. 119:

If the foregoing Interrogatory No. 118 is answered in the negative, list which of said plaintiffs were not so informed and state further what said list of plaintiffs were [359] told with regard to the matters set forth in Interrogatory No. 118.

Dated at Los Angeles, California, this 24th day of October, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd.

[Endorsed]: Filed Oct. 27, 1947. Edmund L. Smith,
Clerk. [360]

[Title of District Court and Cause]

DEFENDANT'S REQUEST FOR ADMISSIONS

To the Plaintiffs in the Above Entitled Action, and to
David Sokol, Esq., Their Attorney:

Please Take Notice that pursuant to Rule 36 of the Federal Rules of Civil Procedure you are requested to admit within fifteen (15) days after service upon you of this request, for the purposes of this action only and subject to all pertinent objections to admissibility that may be interposed at the trial, the following:

1. That the plaintiffs who are alleged in paragraph III of the first cause of action in the third amended complaint to have been employed as primary service men worked a scheduled [361] eight hour daily shift.

2. That the plaintiffs who are alleged in paragraph III of the first cause of action in the third amended complaint to have been employed as primary service men were paid a monthly salary (payable in semi-monthly installments) or a weekly salary, which was paid to them for eight hours per day for five days a week, or forty hours of service per week, except during the period that the said Distribution Division of the defendant was, pursuant to the requirements of the War Manpower Commission, operating upon a forty-eight hour week, during which period they were employed for eight hours of work per day, or an eight hour daily shift, for six days a week, and that the sixth day was reported by each of the said plaintiffs as eight hours of overtime for which each of said plaintiffs was paid not less than time and a half.

3. That each of the said plaintiffs who are alleged in paragraph III of the first cause of action in the third amended complaint to have been employed as primary

service men was paid a monthly salary (payable in semi-monthly installments) or a weekly salary which was in full for his services performed during eight hours per day, or forty hours per week, and that they were each paid at least time and a half for any active services which they reported as performing between said eight hour shifts.

4. That none of the said plaintiffs who are alleged in paragraph III of the first cause of action in the third amended complaint to have been employed as primary service men was ever paid anything other than their monthly salary for the requirement that during certain days of the week at the end of their shift, if they did not return home or after returning they left their homes, they advise the switching center where they could be reached in case their services were needed in case of an emergency, or for being required on certain days of the week at Santa Paula, if they were home, to take telephone calls on their home phones [362] directly from customers.

5. That the active duties (other than emergency services reported by them as having been performed during nighttime hours as said terms emergency services and nighttime hours are defined in the answer to the third amended complaint) of each of the plaintiffs who are alleged in paragraph III of the first cause of action in the third amended complaint to have been employed as substation operators and attendants or relief operators and attendants normally consumed substantially less than eight hours per day.

6. That the contract of employment between defendant and the plaintiffs who are alleged in paragraph III of the first cause of action in the third amended complaint to have been employed as substation operators and attendants or relief operators and attendants was as alleged in sub-

paragraphs (E) and (F) respectively of Paragraph III of the defendant's answer to the first cause of action in the third amended complaint.

7. That the active duties (other than emergency services reported by them as having been performed during nighttime hours as said terms emergency services and nighttime hours are defined in the answer to the third amended complaint) of each of the plaintiffs who are alleged in the third paragraph of the first cause of action in the third amended complaint to have been employed as hydro station attendants or apprentice attendants normally consumed substantially less than eight hours per day.

8. That the contract of employment between the plaintiffs who are alleged in paragraph III of the first cause of action in the third amended complaint to have been employed as hydro station attendants or apprentice attendants was as alleged in subparagraph (H) of paragraph III of the defendant's answer to the first cause of action in the third amended complaint.

9. That the active duties (other than emergency services [363] reported by them as having been performed during nighttime hours as said terms emergency services and nighttime hours are defined in the answer to the third amended complaint) of each of the plaintiffs who are alleged in paragraph III of the first cause of action in the third amended complaint to have been employed as head works tenders normally consumed substantially less than eight hours per day.

10. That the contract of employment between the plaintiffs who are alleged in paragraph III of the first cause of action in the third amended complaint to have been employed as head works tenders was as alleged in sub-

paragraph (G) of paragraph III of the defendant's answer to the first cause of action in the third amended complaint.

11. That the facts alleged in the defendant's fourth affirmative answer and defense to the third amended complaint are true.

12. That the Wage and Hour Administrator issued Interpretative Bulletin No. 13 in July of 1939, that the same was revised in October, 1939, October, 1940, and November, 1940, and that as revised the 6th, 7th and 8th paragraphs thereof have, ever since the said bulletin was issued, read as set out in paragraph III of defendant's fourth affirmative answer and defense to the third amended complaint.

13. That the allegations of paragraph IV of defendant's fourth affirmative answer and defense to the third amended complaint are true and correct.

14. That the portions of the report of the mediation panel of the National War Labor Board as set out in subparagraph (C) of paragraph IV of defendant's fourth affirmative answer and defense to the third amended complaint is a true and correct statement of said portions of said report.

15. That the third order of the National War Labor Board [364] as set out in subparagraph (C) of paragraph IV of defendant's fourth affirmative answer and defense to the third amended complaint as follows:

"3. The union's request for premium pay for resident employees of the company is denied."

is a true and correct statement of said order.

16. That the allegations of paragraph V of defendant's fourth affirmative answer and defense to the third amended complaint are true and correct.

17. That the allegations of paragraph VI of defendant's fourth affirmative answer and defense to the third amended complaint are true and correct.

18. That the allegations of paragraph VII of defendant's fourth affirmative answer and defense to the third amended complaint are true and correct.

19. That on or about July 5, 1941, there was a radio discussion of the Fair Labor Standards Act between Mr. Mullendore, then Executive Vice-President of the defendant, and Mr. Stellern, then Southern California Manager of the Wage and Hour Division of the United States Department of Labor, during which Mr. Stellern stated to Mr. Mulendore that the United States Department of Labor had inspected the records of the defendant Company and had found the Company to be operating in "complete compliance with the Act."

Dated at Los Angeles, California, this 28th day of October, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd. [365]

Received copy of the within Defendant's Request for Admissions this 28th day of October 1947. David Sokol, by Elizabeth Watson, Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 29, 1947. Edmund L. Smith, Clerk. [366]

[Title of District Court and Cause]

PLAINTIFFS' REQUEST FOR ADMISSIONS

To the Defendant and Its Attorneys:

Please Take Notice that pursuant to Rule 36 of the Federal Rules of Civil Procedure you are requested to admit within ten (10) days after service upon you of this request, for the purposes of this action only and subject to all pertinent objections to admissibility that may be interposed at the trial, the following:

1. That in the year 1945, approximately June 15, 1945, the defendant submitted to the National War Labor Board a request for approval of a salary adjustment for the plaintiffs, Hydro employees, in words in part as follows: [367]

"8. (c)

<u>Department or Type of Employee</u>	<u>Name</u>	<u>Labor Organization Address</u>	<u>Affiliation</u>
Operator, Apprentice;	International	2316 W. 7th	A. F. of L.
Attendant, Hydro Station;	Brotherhood of	Los Angeles	
Attendant, Relief Hydro;	Electrical		
Operator, Relief Hydro;	Workers		
Operator, 1st Hydro—			
Base Plant; Station Chief,			
Asst. Hydro—Base;			
Station Chief, Hydro Plant.			

9. To be initiated on June 15, 1945, to as many locations as practical and to be progressively made system wide as soon as practical.

10. Heretofore, certain of the Company's positions of hydro-generation attendants at the Company's Base Plants have included, in addition to their regular

active duties at the various plants to which they are assigned and as a part of the inactive duties attached to such positions, the requirement that, when not performing such regular duties at said plants, they remain on the Company's premises or in their homes on or adjacent thereto up to 24 hours a day on certain days each week and over 40 hours during each week.

Such men have been and are paid specified salaries on a monthly basis for these positions. The Company desires to change its method of operation so as to eliminate the requirement that such employees so remain throughout such periods, and to prescribe that no such employee will be required to remain on the Company premises or in his said home more than 40 hours during any work week in performing both his active and inactive duties.

However, while eliminating this one inactive factor of the job of having to remain on the premises more than 40 hours during any one work week, the Company desires to continue paying to each of these employees his present monthly salary, leaving his present rate range intact."

2. That during the year 1945, at approximately June 15, 1945, the defendant submitted to the National War Labor Board a request of approval of a salary adjustment for plaintiffs, classified as headworks tender, relief headworks tender, station chief, Group D, operator 1st, Group D, substation attendant, Group E, that in said classification the classifications and wage rates were set forth as follows: [368]

"Job Classification"	Number of employees in this job classif. actually working	Established Rate Range		*Average annual hourly rate	
		Min.	Max.		
Headworks Tender	14	\$140-	\$200 Mo.	\$.9992)	See
Relief Headworks Tender	3	140-	160 Mo.	.8986)	explana-
Station Chief, Group D	14	180-	200 Mo.	1.106)	tion
Operator 1st, Group D	17	170-	180 Mo.	1.0332)	at-
Substation Attendant, Group E	68	160-	175 Mo.	.9846)	tached

*These computations are based upon the assumption that the regular hours worked, paid for by the monthly salary, equaled eight hours per day, five days per week."

That also in said application the proposed adjustment in salary was requested in the following language:

"9. To be initiated on June 15, 1945, to as many locations as practical and to be progressively made system wide as soon as practical.

"10. Heretofore, certain of the Company's positions of Headworks tenders and attendants at substations classified as Group D and E have included as part of the inactive duties attached thereto the requirement that men holding such positions remain on the Company's premises or in their homes on or adjacent thereto up to twenty-four hours a day on certain days each week and over forty hours during each week. Such men have been and are paid specified salaries on a monthly basis for these positions. The Company desires to change its method of operation so as to eliminate the requirement that such employees so remain throughout such periods and to prescribe that no such employee will be required to so remain on the Company premises or in his said

home more than forty hours during any work week in performing both his active and inactive duties. however, while eliminating this one inactive factor of the job of having to remain on the premises more than forty hours during any work week, the Company desires to continue to pay to each of these employees his present monthly salary, leaving the present rate changes intact."

3. That said applications for salary adjustments made as set forth in paragraphs 1 and 2 above were approved by the National War Labor Board and were later put into effect by the defendant.

4. That said applications for approval of salary adjustment presented to the National War Labor Board were signed on behalf of the defendant by its Vice President, R. G. Kenyon. [369]

5. That the same explanation which appeared under the classifications and wage rates for headworks tender and others as noted in paragraph 2 hereof, to-wit:

"These computations are based upon the assumption that the regular hours worked, paid for by the monthly salary, equaled eight hours per day, five days per week."

also appeared as an explanation, following the wage rates and classifications for Hydro employees in the application for salary adjustment submitted to the National War Labor Board referred to in paragraph 1 hereof.

DAVID SOKOL

Attorney for Plaintiffs [370]

[Affidavit of service by mail.]

[Endorsed]: Filed Nov. 7, 1947. Edmund L. Smith, Clerk. [371]

[Title of District Court and Cause]

OBJECTIONS TO INTERROGATORIES AND OBJECTIONS TO REQUEST FOR ADMISSIONS

Now come the plaintiffs and make the following objections to interrogatories and request for admissions:

(1) Plaintiffs object to answering any of the interrogatories on the following grounds:

(a) Defendant has already discovered the facts therein referred to by the taking of depositions from a number of the plaintiffs in each classification involved in this action and the questions propounded in said deposition relate to all of the facts sought in the interrogatories.

(b) In order to answer the interrogatories, plaintiffs would have to have the books and records and payroll records of the defendant; plaintiffs are relying upon the records of the defendant. [372]

(c) The interrogatories are unnecessary and burdensome, and as a matter of fact, all of the facts therein requested are already in the record.

(d) Answering the interrogatories could add nothing to what the defendant already knows.

(2) Plaintiffs object to answering the following request for admissions: 13, 14, and 15 on the ground that the same are incompetent, irrelevant, and immaterial.

Points and Authorities

Where interrogatories cover a multitude of evidentiary details, plaintiff should resort to an oral examination of witnesses, and service of interrogatories to obtain such information is not proper.

Hartford Empire Co. v. Glennshaw Glass Co.,
(D. C. Pa. 1944), 4 F.R.D. 210.

- New England Terminal Co. v. Graver Tank & Mfg. Corp. (D. C., R. I. 1940), 1 F.R.D. 411.
Breakwater Paper Co. v. Monadnock Paper Mills (D. C., Mass. 1942), 2 F.R.D. 547.
Checker Cab Mfg. Corp. v. Checker Taxi Co. (D. C., Mass. 1942), 2 F.R.D. 547.
Knox v. Alter (D. C., Pa. 1942), 2 F.R.D. 337.
Stewart-Warner Corp. v. Staley (D. C., Pa. 1941), 2 F.R.D. 199. [373]

The District Court is vested with broad discretion to control the scope of interrogatories, and to deny compulsory answers where interrogatories are unnecessary, burdensome, or filed in bad faith for ulterior purpose. Federal Rules of Civil Procedure, rule 33, 28 U.S.C.A. following section 723c.—*De Bruce v. Pennsylvania R. Co.*, 6 F.R.D. 403.

Where it was not apparent how plaintiffs' interrogatory, even if facts involved were relevant, could add anything to what plaintiff himself already knew, exception to the interrogatory would be sustained.—*Doman v. Isthmian S. S. Co.*, 6 F.R.D. 609.

Where plaintiff is unable to respond to a demand for particulars because of lack of knowledge that is obtainable only through an examination before trial of defendants or their books and papers, plaintiff need not do so. Federal Rules of Civil Procedure, rules 12 (e), 26 (a), 28 U.S.C.A. following section 723C.—*Dreskin v. Zinkin*, 6 F.R.D. 615.

Respectfully submitted,

DAVID SOKOL

[Endorsed]: Filed Nov. 13, 1947. Edmund L. Smith, Clerk. [374]

[Title of District Court and Cause]

NOTICE OF OBJECTIONS TO DEFENDANT'S
INTERROGATORIES AND REQUEST FOR
ADMISSIONS

To the Defendant and its Attorney:

Please Take Notice that the objections to the defendant's interrogatories and request for admissions herein will be presented to the Honorable William C. Mathes, Judge of the above-entitled Court, on November 24, 1947, at 10:00 A. M.

Dated: November 13, 1947.

DAVID SOKOL

Attorney for Plaintiffs

[Endorsed]: Filed Nov. 13, 1947. Edmund L. Smith,
Clerk. [375]

[Title of District Court and Cause]

PLAINTIFFS' ANSWER TO DEFENDANT'S
REQUEST FOR ADMISSIONS

Plaintiffs answering defendant's request for admissions, allege:

I.

Deny the allegations in paragraphs 1, 5, 6, 7, 8, 9, 10, 11, 16, 17, and 18.

II.

Answering paragraph 2 of defendant's request for admissions, plaintiffs allege that they were paid a salary for

all services and that it was agreed that they would receive time and a half the regular hourly rate for all hours worked in excess of forty in any work week, but that defendant paid only said salary and time and a half for emergency call-outs after forty hours in the work week, except during the period when the War Man Power Commission Rules prevailed and plaintiffs received overtime for [376] the eight hours on the sixth day of work.

III.

The answer to defendant's request for admissions number 3 is set forth above. It is admitted that the plaintiffs received the overtime for the emergency call-outs.

IV.

Plaintiffs by way of answer to defendant's request for admissions number 4, admit that the primary service men received only their salary and time and a half the regular hourly rate for emergency call-outs.

V.

Answering defendant's request for admissions number 12, admit that paragraphs 6, 7, and 8 of Interpretative Bulletin No. 13 read as set out in Paragraph III of defendant's fourth affirmative defense, except that the last sentence of paragraph 6 of the bulletin should read:

"Thus, if, over a period of several months, a telephone operator has been called upon to answer only a few calls between the hours of twelve and five in the morning, a segregation of such hours from hours worked will probably be justified."

VI.

Object to answering defendant's request for admissions number 13, 14, and 15 on the ground that the same is incompetent, irrelevant, and immaterial.

VII.

Answering defendant's request for admissions number 19, plaintiffs have no information, knowledge, or belief sufficient to enable them to answer said request and on said ground deny the allegations therein. Further, plaintiffs deny said allegations on the ground that the only records in the office of the Wage and [377] Hour Administrator in Los Angeles reflect the fact that the administrator and the local office in Los Angeles have held that power companies in this area have violated the Fair Labor Standards Act by failure to pay time and a half the regular hourly rate of pay to various employees for hours spent on call for the convenience of the company in excess of forty hours per week, and have held that failure to record and pay for stand-by hours or hours on call put in generally at substations are in violation of the Fair Labor Standards Act of 1938.

DAVID SOKOL

Attorney for Plaintiffs [378]

[Verifications.]

[Endorsed]: Filed Nov. 13, 1947. Edmund L. Smith,
Clerk. [381]

[Title of District Court and Cause]

AFFIDAVIT

State of California

County of Los Angeles—ss.

Merle M. Edgerton, E. N. Sweitzer, George F. Larsen, G. W. Stark, and C. S. Myrenius, being first duly sworn, depose and say:

Answering the affidavit of J. A. Stellern, affiants state that said J. A. Stellern was for a time branch manager of the Wage Hour Office, in Los Angeles, and during the latter period of his employment was a supervising inspector in the Los Angeles Wage and Hour Division Office. That pursuant to the text of amendments to the regulations explaining the practice and function of the Wage and Hour Division (1945 Wage Hour Manual, page 271), and pursuant to the amendment issued October 28, 1947 (1947 Wage Hour Report, page 3055): [382]

“(a) The Administrator plans and directs the administration and enforcement work of the Division; issues regulations under the Fair Labor Standards Act pursuant to authority conferred thereby; and issues interpretations of the various provisions of the acts. He is assisted in his executive duties by a deputy who performs the duties set forth below and by an assistant who performs special assignments at his direction.

“(b) The Deputy Administrator is in administrative charge of the Divisions in the absence of the Administrator; shares with the Administrator the task of considering and acting upon major problems arising under the acts; and is the Administrator’s prin-

cipal assistant in carrying out the functions of his office. He is aided by an assistant."

With reference to the authority and work of the field organization of which Mr. Stellern was an employee, the regulations provide that the field organization has power to inspect and to investigate. The issuance of interpretations and determination of violations is the work of the Administrator and the Deputy Administrator and not that of the Field Staff.

The local Los Angeles office of the Wage and Hour Division has had no authority at any time to interpret the Fair Labor Standards Act of 1938.

Mr. Stellern, in his affidavit, states that he made a broadcast with Mr. Mullendore in 1941, wherein it was stated that the defendant was in complete compliance with the Act. Affiants have no knowledge concerning this broadcast, but state that none of the employees to their knowledge in the local office of the Wage and Hour Division had any authority to interpret the Act and allege that there was never any statement made to the defendant that its method of payment to the plaintiffs involved in this action, was in compliance with the law. The records in the offices [383] of the Wage and Hour Division disclose that the only time that a complaint has been made concerning violations of the Fair Labor Standards act in non-payment of overtime to employees doing the type of work done by the plaintiffs in this case, that in such instance the inspector for the local office found that the power company was violating the Act.

In the case of the California Electric Power Company complaints were made similar to the complaint in this case and the Los Angeles office of the Wage and Hour Division notified the California Electric Power Company that fail-

ure to pay time and a half the regular hourly rate of pay to various employees for hours spent on call for the convenience of the company in excess of forty hours per week showed non-conformance with the requirements of the Act, as did the company's failure to record and pay for stand-by hours or hours on call put in generally in substations. This complaint against the California Electric Power Company also involved other employees, such as hydro, substation and patrolmen.

Mr. Stellern himself is well aware of the fact that the inspection revealed these violations and that he requested compliance and that the California Electric Power Company in the early part of 1946 came into compliance by providing for overtime where, "if, due to operating reasons, the supervisor orders him (the employee) to remain at home, such time when the employee was so required to remain at home" was thereafter compensated up to 14 hours each day. The notification of the terms of the compliance was addressed to Mr. Stellern himself as will be observed in the letter attached hereto as Exhibit "A" and made a part hereof.

Affiants further state that the Wage and Hour Division has not at any time notified the defendant in writing or otherwise that its failure to pay plaintiffs or other employees in the same classifications overtime while on call and stand-by on the premises of the company, was not a violation of the Act. [384]

This is indicated further by the fact that the defendant in 1945 sought approval from the National War Labor Board to continue paying the same salary to these employees without the requirement that they remain on the defendant's premises more than forty hours during any work week. In such application the defendant requested

approval of its proposal to pay the same salary for forty hours during any work week to these employees in the performance of both their active and inactive duties, and further defendant stated that its practice of paying a salary was based upon the assumption that the regular hours worked paid for by said monthly salary equaled eight hours per day, five days per week.

The defendant was seeking approval to eliminate stand-by and on call time. If defendant had been informed by the Government that it was not necessary to pay for such time, it would have been idle to seek approval of the elimination thereof by the National War Labor Board. [385]

MERLE M. EDGERTON

Subscribed and sworn to before me this 9th day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

E. N. SWEITZER

Subscribed and sworn to before me this 9th day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

GEORGE F. LARSEN

Subscribed and sworn to before me this 9th day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

G. W. STARK

Subscribed and sworn to before me this 9th day of
November, 1947.

(Seal)

DAVID SOKOL

Notary Public

C. S. MYRENIUS

Subscribed and sworn to before me this 9th day of
November, 1947.

(Seal)

DAVID SOKOL

Notary Public [386]

EXHIBIT "A"

U. S. DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

417 H. W. Hellman Bldg.

354 South Spring Street

Los Angeles 13, Calif.

December 27, 1945

Address all

communications to:

Supervising Inspector

California Electric Power Company

8th & Market Streets

Riverside, California

In Reply Refer to:

File No. RPT:rh

Attention Mr. Albert Cage

Dear Sirs:

Thank you for your communication of December 21,
wherein you set forth your plans for attaining compliance
with the Fair Labor Standards Act in accordance with the
instructions of this office.

Your proposals appear to meet the requirements in every
respect and we thank you for your prompt attention to

the matter, and for the cooperation given during the course of inspection.

Please do not hesitate to use the services of this office on any questions that may arise in the future.

Very truly yours,

(Signed) J. A. Stellern

J. A. Stellern

Supervising Inspector [387]

Received copy of the within Affidavit this 20 day of Nov., 1947. Gibson, Dunn & Crutcher, by L. M.

[Endorsed]: Filed Nov. 21, 1947. Edmund L. Smith, Clerk. [388]

[Title of District Court and Cause]

AFFIDAVIT OF PLAINTIFFS—SUBSTATION
OPERATORS

State of California

County of Los Angeles—ss.

The undersigned plaintiffs being first duly sworn, depose and say: that the only agreement entered into by the substation employees and the defendant, Southern California Edison Company, was that said employees would be hired on a salary basis, were required to remain on the premises twenty-four hours per day, and were to receive time and a half for all hours worked in excess of forty hours in each work week.

In the hiring of substation help it was customary that prospective operators learned about the job and asked for employment on such job, usually going first to the division superintendent, who interviewed all operators first

and then sent them to the main office. At the main office, nothing was said to substation operator that the work required only a few hours per day, or two or [389] three hours per day. What was stated was that the physical activities required eight hours per day and that each employee was required to remain on the premises for the balance of the sixteen hours each day. This is confirmed by the fact that the defendant company required substation employees to place on their time record only eight hours per day. Furthermore, the log entries show at least eight hours per day and frequently more.

In answer to the affidavit of J. D. Garrison, affiants state Mr. Garrison did not say that the active duties required two or three hours per day. On the contrary, Garrison informed substation employees that twenty-four hours each day was required of them.

With respect to the affidavit of Short, he did not at any time say that the substation employees could do as they pleased either after or during their regular work. No official of the defendant company at any time said that substation employees could do as they pleased. After eight hours the substation operators considered themselves free from routine duties but understood that they were still, for the balance of the 24-hour work day, in the employ of the defendant company.

When employed the substation employees were informed that the job required twenty-four hours each day. Nothing was said by any officer, agent, or representative of the defendant that the job was the equivalent of eight hours

of duty or less. There were eight day hours each day when the employees were required to take readings and stay at the substation proper on company duty. Only after such eight hours could they go to their home on the premises. They were not free to do as they pleased during any part of said eight hours, or during the entire 24-hour period of each work day.

With respect to the failure of the plaintiffs to place on their time records the remaining sixteen hours each day as overtime, affiants state that the defendant's officers and agents [390] informed employees not to put down such time on the time record.

Affiants state that each work day they performed more than eight hours services for which they did not get paid. Plaintiffs were paid a monthly salary and were required to be on the premises twenty-four hours a day. They were instructed to put down only eight hours per day on their time cards. Overtime for special emergency work was paid after eight hours per day. During the entire twenty-four hour period of each work day, plaintiffs who were employed in the substations were subject to emergency calls and were required to wait for such emergency calls and to perform the other duties required of them by defendants.

MERLE M. EDGERTON

Subscribed and sworn to before me this 9 day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

G. W. STARK

Subscribed and sworn to before me this 9 day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

GEORGE F. LARSEN

Subscribed and sworn to before me this 9 day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

E. N. SWEITZER

Subscribed and sworn to before me this 9 day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

HOWARD L. ANDERSEN

Subscribed and sworn to before me this 9 day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

C. S. MYRENIUS

Subscribed and sworn to before me this 9 day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public [391]

Received copy of the within Affidavit this 20 day of Nov., 1947. Gibson, Dunn & Crutcher, by L. M.

[Endorsed]: Filed Nov. 21, 1947. Edmund L. Smith, Clerk. [392]

[Title of District Court and Cause]

AFFIDAVIT OF PRIMARY SERVICE MEN

State of California

County of Los Angeles—ss.

J. D. Borden, A. L. Honnell, C. C. Prinslow, and L. A. Phinney, being first duly sworn, depose and say: that they are plaintiffs in the classifications of primary service men.

Answering the affidavit of E. N. Husher, affiants state that the primary service men involved in this case were not employed on a definite eight-hour shift basis. Paul W. Cockrell, Clarence C. Prinslow, and A. L. Honnell were employed in the Huntington Beach district and their schedule of working hours provided seven (7) days a week on a twenty-four (24)-hour schedule each day, the following week three (3) days of eight (8) hours each, and four (4) days off. The 24-hour shift included eight hours of [393] working time and sixteen hours on stand-by duty. The men were required when on the 24-hour schedule to take all calls with respect to emergency work required. On the days when they were on an eight-hour shift, they were through immediately upon the expiration of the eight hours. During the sixteen hours of stand-by duty, if these plaintiffs in the Huntington Beach district were not available to answer all calls at their home, they were subject to discharge. As a result they had to stay in their homes to answer the calls and to be prepared immediately to do the work required. They were required after their eight hours of work while on stand-by, to take their working equipment home with them in order to be available to do the work.

Although these plaintiffs in the Huntington Beach district were told that they could leave the home if they

notified the company where they could be called by telephone, in practice this was not possible and, therefore, they were required by the necessity of the work to remain at home. The defendant required that these plaintiffs install, at their expense, a telephone at their residences for the calls while on stand-by duty.

The plaintiffs, L. A. Phinney, John M. Smith, and W. H. Culbertson were employed in the Santa Paula district. These plaintiffs had the same schedule as the Huntington Beach district primary service men. They were, in addition to the regular duties, required to answer telephone calls from consumers in the area. For this purpose the company required of them that they have a telephone and the telephone directories contained, under the heading Southern California Edison Company, the telephone number for two of the primary service men at Santa Paula, Culbertson and Phinney, so that consumers and the public, after 5:00 p. m., instead of calling the company's office, called these plaintiffs for service. Defendant, however, did not include as overtime the time spent in answering these calls which took place each day. [394] These plaintiffs were required by defendant for the seven days when they were on 24-hour duty to remain at their home for sixteen hours at the telephone so that they could be reached by defendant and consumers. The plaintiff Smith was also required to remain at home. During the 16-hour stand-by period, these plaintiffs were required to answer all trouble calls. They were subject to discharge for failure to answer any such calls at any time.

The plaintiff, J. D. Borden, was employed in the Vernon City district on a schedule of two days on 24 hours; three days on 8 hours and a half hour for lunch; and two days off. The time on the 8-hour shift was from 7:00 a. m., to 3:30 p. m., or from 3:00 p. m. to 11:30 p. m.

While on the 24-hour schedule, this plaintiff was either on active duty or stand-by for active duty. He was required by defendant to stay in his home while standing-by for active duty. In about October, 1945, the defendant for the first time informed this plaintiff that it would no longer be necessary for him to remain at home while on stand-by. The day shift for the plaintiff Borden was three days at eight hours each, two days of 24 hours and two days off. While on the night shift he worked three days on sixteen hours and two days on 24 hours and two days off.

All of the plaintiffs who were primary service men were paid a semi-monthly salary which was computed on the basis of forty hours a week and it was agreed by defendant in its order A-36 that these plaintiffs would receive time and a half for all hours worked in excess of forty hours each work week, in addition to their salary. However, defendant paid these plaintiffs only their salary and time and a half for the actual time consumed when called out for emergency service on stand-by time.

They were not free to do what they pleased after their normal eight hours of work but during the remaining sixteen hours of the days when they were on stand-by duty, they were required [395] to take the company's equipment, trucks, etc., with them and remain at their homes at the telephone to answer all calls. There was no difference in the nature of the work as between the time on regular duty and the time on stand-by duty because trouble calls came in throughout the 24-hour period and in between such calls men were required to wait to answer such calls.

During the sixteen hours of stand-by duty if calls came in and the men dressed and prepared to go out to answer

the call, and before they left were notified that the trouble had been taken care of, they were not given overtime for such time consumed in preparing to answer the call.

These plaintiffs were instructed upon coming to work for the defendant that they were to receive a salary for all services for the defendant and sometime after their employment they were notified that they would receive time and a half for the emergency call-outs. The salary was computed on a basis of forty hours a week, consisting of eight hours a day, five days a week, except when the men were subject to the War Man Power Regulations and received eight hours at time and a half their regular hourly rate for the work on the sixth day. [396]

J. D. BORDEN

Subscribed and sworn to before me this 9 day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

A. L. HONNELL

Subscribed and sworn to before me this 9 day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

C. C. PRINSLOW

Subscribed and sworn to before me this 9 day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public

L. A. PHINNEY

Subscribed and sworn to before me this 9 day of November, 1947.

(Seal)

DAVID SOKOL

Notary Public [397]

Received copy of the within Affidavit this 20 day of Nov. 1947. Gibson, Dunn & Crutcher, by L. N.

[Endorsed]: Filed Nov. 21, 1947. Edmund L. Smith, Clerk. [398]

[Title of District Court and Cause]

PLAINTIFF HYDRO EMPLOYEES ANSWER
TO DEFENDANT'S INTERROGATORIES 66
THROUGH 93 [399]

Answers to Interrogatories 66 Through 93 Relating to
Hydro Station Attendants or Apprentice Attendants

Answer to Interrogatory 66: These plaintiffs were on a semi-monthly salary and did not receive any compensation other than the salary and time and a half for all hours reported by them in excess of forty hours per week; however, the defendant instructed these plaintiffs not to put down on their time records more than eight hours per day and time spent on emergency call-outs. These plaintiffs were instructed by defendant not to put down any time spent on call or while standing by to answer emergency call outs, although they were required to re-

main on the defendant company's premises for such purpose for twenty-four hours each work day.

Answer to Interrogatory 68: The answer to this Interrogatory is "Yes."

Answer to Interrogatory 70: Plaintiffs' Hydro employees must refer to the defendant's records to answer this interrogatory.

Answer to Interrogatory 71: Hydro station attendants had one to three stations to handle. The active duties were: taking orders from the station chief and assistant station chief, making regular inspection of each station to see that all mechanism was functioning properly, seeing that all motors, bearings and the governor were oiled, cleaning up the stations, keeping up the grounds around each station—seeing that there were no weeds, and maintaining the fire-break around the fence, maintaining the intakes in such condition that there are no obstructions, patrolling pipe lines and pen stocks, and taking meter readings and making daily reports. The power house must be kept clean and painted at all times, and the home kept repaired and presentable. This home is on company grounds within the company fence for which the employee pays rent but is required to keep in presentable condition. These Hydro employees make minor repairs both electrically and mechanically. They must live on the premises and answer all [400] telephone calls and alarms. They were not permitted to leave the premises

except on their days off. The telephones were located in the station proper and in the house. The alarm bells were about three inches in diameter and were in the bedrooms in the home and also in the substation building. They are also in the relief quarters. During the night time hours these bells and telephones are answered whenever they are rung.

Answer to Interrogatory 72: The work of the apprentice attendant was similar to the work of the Hydro station attendant.

Answer to Interrogatory 73: The answer is "No," but generally the men were in the Hydro stations between 8:00 a.m. and 4:00 p.m. and thereafter were required to remain in and about the grounds or the home or relief quarters to answer calls and emergencies.

Answer to Interrogatory 75: The answer to this interrogatory is that the plaintiffs were required to put in all of the time required in active work and also to remain on the premises for the remainder of the twenty-four hour period.

Answer to Interrogatory 78: The Hydro station employees put down eight hours on their time records each work day because they were so instructed by the defendant's officers.

Answer to Interrogatory 79: The plaintiffs understood that the reported eight hours represented eight hours of work.

Answer to Interrogatory 80: The plaintiffs understood that they were getting a salary for the work performed for the defendant, that the salary was based on forty hours of work each week and that they were to receive time and a half their regular hourly rate for all hours worked in excess of forty hours in each work week. There was no reference at any time or at any place to active or inactive duties. There was never any distinction made by defendant between active or inactive duties. The defendant required the plaintiffs to perform their labors twenty-four [401] hours a day.

Answer to Interrogatory 81: The answer to this interrogatory appears above.

Answer to Interrogatory 82: Order A36 of the defendant provides for overtime for all hours in excess of forty hours in the work week.

Answer to Interrogatory 83: The contract referred to is now in evidence in this case, having been introduced in the pre-trial.

Answer to Interrogatory 84: The activity in which the plaintiffs were engaged to wait to answer emergencies was compensable by custom and practice. Defendant contends that the active duties of the plaintiff consumed not more than two or three hours a day; yet plaintiffs were paid for eight hours. Obviously, it was not for eight hours active duty for which plaintiffs were paid according to defendant, nor was it for any definite num-

ber of hours "actual" work. Plaintiffs were being paid for all services regardless of the time of day when they were performed. This shows a custom and practice of paying for the activity in which plaintiffs were engaged during the time spent in waiting for calls and emergencies.

Answer to Interrogatory 85: This is answered in the preceding answer.

Answer to Interrogatory 86: The answer is "No."

Answer to Interrogatory 88: Object to answering this interrogatory.

Answer to Interrogatory 90: The answer is "Yes." However, the requirement that the plaintiffs remain on the company's property twenty-four hours a day was not always in effect. There was the twelve hour day up to March 1918, and thereafter, ten hours from March 1918, to November 1918, and thereafter eight hours to 1921 when the twenty-four hour requirement came [402] into effect.

Answer to Interrogatory 92: The answer is "Yes."

DAVID SOKOL

Attorney for Plaintiffs [403]

[Verified.] [404]

Received copy of the within this 20 day of Nov., 1947. Gibson, Dunn & Crutcher, by L. N.

[Endorsed]: Filed Nov. 21, 1947. Edmund L. Smith, Clerk. [405]

[Title of District Court and Cause]

DEFENDANT'S RESPONSE TO PLAINTIFFS'
REQUEST FOR ADMISSIONS

The plaintiffs, having duly served upon the defendant a further Request for Admissions pursuant to Rule 36 of the Federal Rules of Civil Procedure, the defendant now makes the following responses to said Request for Admissions:

I.

Defendant's Response to First Request

Defendant admits that under date of on or about June 28, 1945, it submitted to the National War Labor Board an "Application for Approval of a Wage or Salary Rate Adjustment or Schedule" for the types of employee therein described, a portion of which said Appli- [406] cation is set forth by plaintiffs in their first Request. A true and correct photostatic copy of said Application, in full, is attached hereto as "Exhibit A," and is hereby referred to and incorporated herein with the same force and effect as though here set forth at length.

II.

Defendant's Response to Second Request

Defendant admits that under date of on or about June 28, 1945, it submitted to the National War Labor Board an "Application for Approval of a Wage Salary Rate Adjustment or Schedule" for the types of employee therein described, a portion of which said Application is set forth by plaintiffs in their first Request. A true and correct photostatic copy of said Application, in full, is attached hereto as "Exhibit B," and is hereby referred to

and incorporated herein with the same force and effect as though here set forth at length.

III.

Defendant's Response to Third Request

Defendant admits plaintiffs' third request.

IV.

Defendant's Response to Fourth Request

Defendant admits that the Applications referred to in Answers I and II above were signed on behalf of the defendant by one of its Vice Presidents, R. G. Kenyon. [407]

V.

Defendant's Response to Fifth Request

Defendant admits that the quoted sentence which is set forth in plaintiffs' Fifth Request appeared in each of the Applications referred to in Answers I and II herein above set forth.

Dated: Los Angeles, California, November 21, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd. [408]

* * * * *

[Affidavit of Service by Mail.]

[Verified.]

[Endorsed]: Filed Nov. 24, 1947. Edmund L. Smith,
Clerk. [413]

[Title of District Court and Cause]

PLAINTIFFS' ANSWERS TO INTERROGA-
TORIES PROPOUNDED BY DEFENDANT

Come now the plaintiffs and file their answers to the interrogatories propounded by the defendant:

General Answer and Explanation

The specific answers which follow or which have heretofore been filed, are hereby made subject to the following general answer and explanation.

Many of defendant's interrogatories refer to "active duties". What is an active duty will be a question ultimately to be determined by the Court or jury. None of the answers of the plaintiffs to any question in which the words "active duty" are used by the defendant should be construed as admitting or denying that any particular duty is active or inactive. The fact that certain duties may have expressly or impliedly described one duty or another as active, is not to be construed as stating that the other duties are inactive. The duties of all of the plaintiffs [414] included but was not limited to repairs, maintenance, operation, standby and emergencies. One of the duties for which each of the plaintiffs was engaged was to stand by.

All of the plaintiffs received a monthly or weekly salary which the defendant represented to the plaintiffs covered all of the duties described including standby time. There was a contract and custom to pay for standby time, except that the defendant considered that standby time was paid by the overall monthly and weekly wage.

All specific answers regarding contract, custom, minimum and overtime, active and inactive duties, must be read subject to the above explanation and general answer.

Specific Answers

(Note: Each answer number corresponds to the interrogatory number propounded by defendant above date October 24, 1947).

1. None of the plaintiffs named were employed on a definite eight hour shift for each day of their employment.

2. Primary Servicemen Cockrell, Prinslow and Homell were employed in the Huntington Beach District and their schedule of working hours provided seven days a week on a twenty-four hour schedule each. The week following they had a schedule of three days at eight hours each day, and four days off. Primary Servicemen Phinney, Smith and Culbertson were employed in the Santa Paul District on the same type of schedule as the Huntington Beach District men. Primary Serviceman Borden was employed in the Vernon City District on a schedule of two days of twenty-four hours each, three days of eight hours and a half hour for lunch, and two days off.

3. The Primary Servicemen worked eight hours and the remaining sixteen hours, when they were on twenty-four hour duty, [415] was waiting and caring for emergencies. They were required to take the company's equipment, trucks, etc., with them and remain at their homes at the phone during the standby period. However, while on standby the employer wrongfully paid only for the actual time spent in emergency calls. If an emergency call came and before they left their homes they were notified that the trouble had been taken care of, they were not given overtime for such time consumed in preparing to answer the calls. In addition, the men in the Santa Paul district were required, while at home, to answer all phone calls from patrons and consumers and the public. The telephone directory showed that after 5:00 P. M.

calls to the Southern California Edison Co. went directly to the homes of the Primary Servicemen at Santa Paul. However, these men were not paid for such time as overtime.

4. See answer to 3.

5. See answer to 3.

6. See answer to 3, and affidavit of Primary Servicemen, filed in opposition to defendant's motion for summary judgment.

7. Yes.

8. See answer to 3.

9. See answer to 3.

10. Yes, subject to answer to 3.

11. No, subject to answer to 3.

12. —

13. Yes. The employment agreement between the defendant and the Primary Servicemen provided that they would receive a monthly or weekly salary plus time and a half for all hours in excess of forty hours in each work week for all activities, including emergency and standby activity. See answer to 3.

14. See answer to 13.

15. See answer to 13.

16. The contract was both oral and written. The part [416] in writing is set forth in Order A.36, which was introduced in evidence at the pre-trial and a copy of which is in the possession of the defendant. The part which was oral consisted of the actual hiring and custom and practice and representations made by the defendant to the plaintiffs to the effect that all activities, including

standby, were paid for by the weekly or monthly salary and that in addition to said weekly and monthly salary plaintiffs were to receive time and a half their regular hourly rate for all overtime in excess of forty hours each work week. Such representations were made at the time of the employment of the plaintiffs and at the time that Order A.36 was issued in 1942 and revised in 1943.

17. See answer to 16.

18. See answer to 16.

19. No formal demand was made although the plaintiffs continually complained about the failure of the defendant to pay such overtime. All of the plaintiffs were instructed not to turn in any record on their time cards, time sheets or other records, showing the standby time.

20. —

21. See answers to 3 and 16.

22. See answer to 16.

23. See answer to 16.

24. See answer to 16.

25. See answer to 19.

26. See answer to 19.

27. No.

28. All of the plaintiffs were informed at the time of their employment by the defendant that the requirements of the job that they were undertaking were such that their services were required during 24 hours of each day and they had to be available. See answer to 13. [417]

29. No, except that all activities, including standby, were alleged by the defendant to have been paid for by the

monthly or weekly salary or wage plus the designated overtime.

30. See answer to 29.

31. The plaintiffs made out their own time cards under the supervision of their superiors who instructed them to put down only eight hours plus the emergency call-outs.

32. —

33. Yes.

34. —

35. No, subject to answer 31.

36. —

37. See answer to 19.

38. —

39. Yes, under instructions as in answer to 31.

40. —

41. No, under instructions as in answer to 31.

42. —

43. See answer to 16.

44. See answer to 16.

45. See answer to 16.

46. See answer to 16.

47. See affidavit of substation operators, attendants and relief men (plaintiffs) filed in support of plaintiffs' motion for summary judgment.

48. See answer to 47.

49. The relief men did the same work as the substation operators, except that they did not make the monthly clerical report, and except that they travelled from station to station.

50. See answer to 47.

51. See answer to 47. [418]

52. These plaintiffs were required to be on the premises of the defendant twenty-four hours each day.

Normally they were in the substation proper from about 8:00 A. M. to 5:00 P. M.

53. No, subject to answer to 52.

54. See answers to 52 and 53. Plaintiffs were directed by the defendant to put down eight hours on the time card.

55. There was no understanding concerning this, except that plaintiffs were informed that they were to put down eight hours.

56. No.

57. —

58. The plaintiffs understood that their monthly or weekly salary, plus payment for emergency time, was payment for all duties and activities performed. They were to receive time and a half for all hours in excess of forty in each work week.

59. See answer to 58.

60. No.

61. —

62. Yes.

63. —

64. Yes.

65. —

66-81. Answers on file.

82. See answer to 16.

83. See answer to 16.

84-92. Answers on file.

93. —

94. See answer to 29.

95. See answer to 29.

96. See answer to 31.

97. —

98. No. [419]

99. See deposition of E. G. Eggers, plaintiff, taken by defendant September 25, 1945 and on file.

100. Plaintiffs were required to be on defendant's premises twenty-four hours each day. They are unable at this time to distinguish between active and other duties.

101. No.

102. —

103. No.

104. —

105. The monthly salary to July 1, 1947, and thereafter the weekly salary received and accepted by plaintiffs, or any of them, was allegedly in payment for all of their services.

106. See answer to 105.

107. The plaintiffs were paid a monthly or weekly salary which was intended by defendant to cover all of the services rendered by the plaintiffs, except that the plaintiffs did receive time and a half for responding to emergency calls.

108. —

109. See answer to 105.

110. Plaintiffs have no present information regarding same; said information is contained in the records of the defendant.

111. See answer to 16.

112. See answer to 16.

113. See answer to 16.

114. See answer to 16.

115. See answer to 16.

116. Yes, and residence was on company property.

117. —

118. Yes.

119. —

Dated: January 12, 1948.

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD

By David Sokol

Attorneys for Plaintiffs. [420]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 14, 1948. Edmund L. Smith,
Clerk. [421]

[Title of District Court and Cause]

ADDITIONAL ANSWERS TO DEFENDANT'S
REQUEST FOR ADMISSIONS

Plaintiffs, answering defendant's request for admissions, allege:

I.

Deny the allegations in paragraph 13.

II.

Admit the allegations in paragraph 14.

III.

Admit the allegations in paragraph 15.

Dated: January 12, 1948.

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD

By David Sokol

Attorneys for Plaintiffs. [422]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 14, 1948. Edmund L. Smith,
Clerk. [423]

[Title of District Court and Cause]

NOTICE OF APPLICATION FOR ORDER RE-
QUIRING PLAINTIFFS TO ANSWER IN-
TERROGATORIES

To: The Plaintiffs in the action above entitled, and to
Messrs. Pacht, Warne, Ross & Bernard and to David
Sokol, Esquire, their attorneys:

Take notice that the defendant in the action above entitled will, on Tuesday, the 3rd day of February, 1948, at the hour of ten o'clock A. M., on said date, or as soon thereafter as counsel can be heard, before the Honorable Wm. C. Mathes in his Courtroom in the Federal Post Office and Court House Building, in the City of Los Angeles, State of California, under Rule 37 of the Rules of Civil Procedure for the District Courts of the United States, apply to the Court for an order requiring the plaintiffs to make definite answers to the following interrogatories, upon the ground that each [424] of the following numbered interrogatories has actually not been answered by the plaintiffs:

Interrogatories Nos. 8 and 9: The foregoing interrogatories are answered only by saying, "See answer to 3", which said answer to interrogatory No. 3 does not answer the said interrogatories Nos. 8 and 9.

Interrogatories Nos. 14 and 15: The said interrogatories are answered only by saying, "See answer to 13", which said answer to interrogatory No. 13 does not answer the said interrogatories Nos. 14 and 15.

Interrogatories Nos. 17 and 18: The said interrogatories are answered only by saying, "See answer to 16", which said answer to interrogatory No. 16 does not answer the said interrogatories Nos. 17 and 18.

Interrogatories Nos. 43, 44, 45 and 46: The said interrogatories are answered by saying, "See answer to 16", which said answer to interrogatory No. 16 does not answer the said interrogatories Nos. 43, 44, 45 and 46.

Interrogatory No. 51: The said interrogatory is answered only by saying, "See answer to 47", which said answer to interrogatory No. 47 does not answer the said interrogatory No. 51.

Interrogatories Nos. 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 78, 79, 80 and 81: The said interrogatories are answered only by saying, "66-81 answers on file". The answers to the previous questions refer to other classes of employees and do not answer the said interrogatories Nos. 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 78, 79, 80 and 81, each of which is capable of a categorical and specific answer.

Interrogatories Nos. 84 to 92, inclusive: None of the said interrogatories have been answered at all except by the statement, "Answer on file", which said statement does not answer any of the said interrogatories. [425]

Dated: Los Angeles, California, January 28, 1948.

GAIL C. LARKIN,
E. W. CUNNINGHAM,
ROLLIN E. WOODBURY,
NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER,

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd.

Service of the within Notice of Application is acknowledged this 28th day of January, 1948.

It Is Stipulated that the notice of said application is given within reasonable time, and that the same may be heard at the time noted, to wit, February 3, 1948.

PACHT, WARNE, ROSS & BERNHARD
and DAVID SOKOL

By David Sokol

Attorneys for Plaintiffs

Order to Clerk: File.

MATHES, J.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith,
Clerk. [426]

[Title of District Court and Cause]

ORDER ON DEFENDANT'S MOTION RE
INTERROGATORIES

This cause having heretofore come before the court for hearing on defendant's motion, filed January 29, 1948, requiring plaintiffs to answer certain interrogatories, and the matter having been heard and submitted for decision;

It Is Now Ordered that the defendant's said motion be and is hereby denied.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

May 17, 1948.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed May 18, 1948. Edmund L. Smith,
Clerk. [427]

[Title of District Court and Cause]

ORDER ON MOTIONS FOR SUMMARY
JUDGMENT

This cause having heretofore come before the court for hearing on plaintiff's motion for partial summary judgment, filed September 2, 1947, and defendant's motion for summary judgment, filed October 22, 1947; and it appearing to the court:

(a) that there is no genuine issue as to any material fact involved in determining the right to recovery in this cause;

(b) that as to each plaintiff the action is one to enforce claimed liability for failure of the defendant employer to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended, [29 U. S. C. § § 201 et seq.] with respect to certain activities engaged in by the plaintiff employees [428] prior to the effective date [May 14, 1947] of the Portal-to-Portal Act of 1947 [Public Law No. 49, chapter 52, 80th Cong., 1st sess.; 29 U. S. C. § § 260 et seq.];

(c) that the activities in controversy for which overtime compensation is sought were not made compensable by any contract or custom or practice during the portion of the day when such activities were engaged in [See § 2(a)(b), Portal-to-Portal Act of 1947];

(d) that as to each plaintiff the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, as amended, have been fully met by the defendant employer at all times involved herein prior to May 14, 1947, if the non-compensable activities referred to in (b) and (c) above are ex-

cluded in computing worktime, as § 2(c) of the Portal-to-Portal Act of 1947 directs [cf. *Armour & Co. v. Wantock*, 323 U. S. 126 (1944); *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944); *Tenn. Coal etc. Co. v. Muscoda Local*, 321 U. S. 590 (1944)];

(e) that since this action as to each plaintiff seeks to enforce liability on account of the failure of the employer to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended, “with respect to an activity which was not compensable under subsections (a) and (b)” of § 2 of the Portal-to-Portal Act of 1947, jurisdiction of this court of the subject-matter of the action is expressly withdrawn by the provisions of § 2(d) of the Portal-to-Portal Act of 1947; and

(f) that defendant is accordingly entitled, as [429] a matter of law, to a judgment dismissing this action as to each plaintiff for lack of jurisdiction of the subject-matter;

It Is Now Ordered:

(1) that the motion of plaintiffs for partial summary judgment, filed September 2, 1947, be and is hereby denied;

(2) that defendant's motion for summary judgment, filed October 22, 1947, be and is hereby granted; and

(3) counsel for defendant are directed to submit judgment dismissing this action as to each plaintiff for lack of jurisdiction of the subject-matter—and findings of fact and conclusions of law if so advised [See Rule 52(a) F. R. C. P., as amended March 19, 1948]—pursuant to local rule 7 within 10 days.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

May 18, 1948.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed May 18, 1948. Edmund L. Smith,
Clerk. [430]

In the District Court of the United States
Southern District of California
Central Division

Civil Action No. 4327 WM

MYRON E. GLENN, et al.,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD., a corporation,

Defendant.

JUDGMENT OF DISMISSAL

Plaintiffs having moved for partial summary judgment, and the defendant having moved for summary judgment against all of the said plaintiffs, the said motions came on regularly for hearing before the Honorable Wm. C. Mathes, Judge, on Tuesday, the 3rd day of February, 1948, at the hour of 10:00 o'clock A. M. Plaintiffs appeared by David Sokol, Esquire, and by Bernard Reich, Esquire, of the firm of Pacht, Warne, Ross & Bernhard, their attorneys; the defendant appeared by Norman S. Sterry, Esquire, of the firm of Gibson, Dunn & Crutcher, and Rollin E. Woodbury, Esquire, its attorneys. Said respective motions of the parties were presented to the

Court upon the entire record in the case, including all affidavits and all documents received in evidence on pre-trial hearings, and said motions were argued at length by the respective counsel, counsel for plain- [431] tiff contending, among other grounds, that the Portal-to-Portal Act of 1947 was unconstitutional, and the Court having carefully considered the matter and being fully advised in the premises, and it appearing and the Court finding from the entire record (1) that there is no genuine issue as to any material fact involved affecting the right of recovery of any of the plaintiffs; (2) that as to each plaintiff the cause of action is prosecuted to enforce recovery for an alleged failure of defendant to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended (29 U. S. C. Secs. 201, et seq.) for certain activities alleged to have been engaged in by each plaintiff employee prior to May 14, 1947, the effective date of the Portal-to-Portal Act of 1947, which activities were made non-compensable by subsections (a) and (b) of Sec. 2 of the Portal-to-Portal Act of 1947, unless there was an express provision of a contract to pay for such activities or they were paid for by custom or practice; (3) that the said activities for which overtime compensation is sought by each of the said plaintiffs were not made compensable by any contract or custom or practice within the purview of subsections (a) and (b) of Section 2 of the Portal-to-Portal Act of 1947; and (4) that as to each plaintiff the minimum wage requirements of the Fair Labor Standards Act of 1938 have been fully met at all times involved herein, and that the defendant has at all times complied with all overtime requirements of the Fair Labor Standards Act if the activities for which each plaintiff sues and which are expressly rendered non-compensable by subsections (a) and (b) of Section 2 of

the Portal-to-Portal Act of 1947 are excluded pursuant to the provisions of subsection (c) of Section 2 of the Portal-to-Portal Act of 1947; and the Court having concluded that the Portal-to-Portal Act of 1947 is constitutional and having further concluded from the facts found by the Court as above recited that the defendant's motion for a summary judgment herein should be granted, except that, as the record shows without controversy as [432] hereinbefore set forth, the action seeks to impose a liability upon the defendant employer as to each plaintiff for alleged activities performed by each said plaintiff prior to May 14, 1947, which said activities were not nor were any of them compensable within the purview of subsections (a) and (b) of Section 2 of the Portal-to-Portal Act of 1947, and hence, under subsection (d) of said Section 2 of the Portal-to-Portal Act of 1947, the court is without jurisdiction of the subject matter of said action;

Now, Therefore, by Virtue of the Premises and the Law, It Is Ordered, Adjudged and Decreed that this action be, and the same is, hereby dismissed as to each and all of the plaintiffs for lack of jurisdiction of the Court of the subject matter of the said action.

Dated: June 8, 1948.

WM. C. MATHES

Judge of the United States District Court

Approved as to Form: David Sokol; Pacht, Warne, Ross & Bernhard; by Bernard Reich, Attorneys for Plaintiffs.

Judgment entered Jun. 8, 1948. Docketed Jun. 8, 1948. C. O. Book 51, page 179. Edmund L. Smith, Clerk, by John A. Childress, Deputy.

[Endorsed]: Filed Jun. 8, 1948. Edmund L. Smith, Clerk. [433]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court, to the Defendant Above Named, and to Its Attorneys, Gibson, Dunn & Crutcher and Gail C. Larkin, Esq., E. W. Cunningham, Esq. and Rollin W. Woodbury, Esq.:

Notice is hereby given that the plaintiffs and each of them in the above entitled action hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment entered in this action on June 8, 1948, in favor of defendant and against the plaintiffs, and granting defendant's motion for summary judgment and dismissing the action for lack of jurisdiction, and from each and every part of the said judgment.

Dated: June 28, 1948.

DAVID SOKOL, and

PACHT, WARNE, ROSS & BERNHARD

By Bernard Reich

Attorneys for Plaintiffs [434]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 29, 1948. Edmund L. Smith, Clerk. [435]

[Title of District Court and Cause]

STIPULATION

It Is Stipulated by and between the parties to the above entitled action that the defendant Southern California Edison Company, Ltd. may have to and including the 17th day of August, 1948, to file designation of additional portions of record to be included in the record on appeal in the above entitled action.

Dated: July 29, 1948.

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD

By B. Reich

Attorneys for Plaintiffs

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California Edison Company, Ltd. [440]

It is so ordered.

Dated: Aug. 2, 1948.

WM. C. MATHES

Judge, United States District Court

[Endorsed]: Filed Aug. 2, 1948. Edmund L. Smith,
Clerk. [441]

[Title of District Court and Cause]

STIPULATION EXTENDING PERIOD FOR FILING AND DOCKETING RECORD ON APPEAL PURSUANT TO RULE 73(g) OF THE FEDERAL RULES OF CIVIL PROCEDURE; STIPULATION RE CONSOLIDATION ON APPEAL; ORDER

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto:

1. The time for filing the record on appeal and docketing the action in the Circuit Court of Appeals for the Ninth Circuit is, subject to the approval of the Court, extended to and including September 25th, 1948.

2. The record on appeal in this and the companion case Raymond F. Drake, et al., v. Southern California Edison Company, Ltd., a corporation, Civil Action No. 5544WM, shall be consolidated on appeal in so far as the Rules of the Circuit Court of Appeals for the Ninth Circuit permit, it being contemplated that the parties will submit a single set of briefs for both cases, and the parties here [442] again reaffirm stipulations made heretofore that all papers, documents, affidavits, depositions and any and all other matters filed in one case shall be considered on appeal with the same force and effect as if filed in the other case.

Dated: July 26th, 1948.

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD
By Bernard Reich
Attorneys for Plaintiffs

NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER and
GAIL C. LARKIN
E. W. CUNNINGHAM and
ROLLIN W. WOODBURY

By Norman S. Sterry
Attorneys for Defendant.

It Is So Ordered:

Dated: August 2, 1948.

WM. C. MATHES
District Judge

[Endorsed]: Filed Aug. 2, 1948. Edmund L. Smith,
Clerk. [443]

[Title of District Court and Cause]

STIPULATION AND ORDER RE DESIGNATION
OF RECORD ON APPEAL AND TRANSMIS-
SION OF ORIGINAL PAPERS

Whereas, the plaintiffs herein have filed their designation of the portions of the record in the above entitled case to be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and

Whereas, the plaintiffs, in designating the portions of the record to be transmitted by the Clerk of the above entitled Court to the Clerk of the said United States Circuit Court of Appeals, inadvertently designated the portions of the record to be transmitted to the said Clerk of the Circuit Court of Appeals to also be printed in the record on appeal, and

Whereas, the defendant, in its designation of the portions of the record to be transmitted, specified certain reporter's transcripts, one copy of which has been filed in the above entitled cause, and of which both parties have copies,

Now, Therefore, It Is Stipulated between the parties [452] hereto:

1. That the designation by the respective parties of the record to be transmitted to the said United States Circuit Court of Appeals shall not include or be deemed to include, regardless of any language used in said specifications, the portions of the record lodged with the United States Circuit Court of Appeals to be printed by the Clerk of the said Circuit Court of Appeals, but that after the said record in the above entitled case has been transmitted to the Clerk of the said United States Circuit Court of Appeals, the said parties shall, either by stipulation or notice within the time provided by the rules of the said United States Circuit Court of Appeals, stipulate or designate the portions of the record lodged with the Clerk of the United States Circuit Court of Appeals to be printed by him.

2. That not more than one copy of the reporter's transcript designated by the defendant for inclusion in the said record to be transmitted to the Clerk of the United States Circuit Court of Appeals need be included in said record or transmitted to said United States Circuit Court of Appeals.

3. That the following papers now on file in the office of the Clerk of the above entitled Court, and which have been designated by one or the other of the parties to be transmitted as part of the record to the said Clerk of the United States Circuit Court of Appeals, need not be copied by the Clerk of the above entitled Court, but that the original papers in said record may be transmitted by the said Clerk of the above entitled Court direct to the Clerk of the said United States Circuit Court of Appeals:

(a) All depositions.

(b) Reporter's transcript of pretrial hearings dated November 18, 1946, reporter's transcript of proceedings dated July 11, 1947, and reporter's transcript of argument of Bernard Reich dated February 3, 1948. [453]

4. That the defendant, on or before the 10th day of September, 1948, shall deliver to the Clerk of the above entitled Court exact duplicates of all the exhibits introduced by the defendant at the pretrial hearing of November 18, 1946, which are listed in defendant's specification No. 17. On such delivery of the duplicate of each said document, the Clerk of the above entitled Court shall place upon each copy the appropriate exhibit number, with the word "duplicate" in brackets, and shall then forward the original of such exhibit to the said Clerk of the United States Circuit Court of Appeals as part of the record on appeal in the above entitled case.

It Is Further Stipulated that upon final decision on the appeal in the above entitled case, all original papers forwarded to the Clerk of the United States Circuit Court of Appeals shall be returned to the Clerk of the above entitled Court, and that on the return of all said original papers, all of the duplicate exhibits filed with the Clerk of the above entitled Court by the defendant shall be returned to the defendant.

It Is Further Stipulated that until the return of the original of said exhibits, the duplicates filed by the defendant shall, for the purposes of a retrial or any other proceedings have the same force and effect as the original of said exhibits and shall be deemed to, and shall, constitute a part of the records of the above entitled Court.

5. That the provisions of this stipulation with reference to the transmission of original documents to the Clerk of the said United States Circuit Court of Appeals shall not be deemed in any manner to constitute a waiver upon the part of any of the parties to have any of said original documents including, but not limited to, all depositions and all of the said exhibits specified in defendant's specification No. 17, printed by the said Clerk of the said Circuit Court of Appeals if, on further consideration, either of the parties believes such printing is necessary or desirable, and [454] the right of the parties to stipulate to, or of either party to designate, the printing in the record in the Circuit Court of Appeals of any such original papers shall be the same as though such original

papers had been copied by the Clerk of the above entitled Court into the record transmitted to the said Clerk of the said Circuit Court of Appeals.

6. That this stipulation shall be included by the Clerk of the above entitled Court as a part of the record in the above entitled case to be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: Sept. 2, 1948.

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD
By Bernard Reich
Attorneys for Plaintiffs

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
GIBSON, DUNN & CRUTCHER
By Norman S. Sterry
Attorneys for Defendant

It Is So Ordered.

Dated: Sept. 7th, 1948.

PAUL J. McCORMICK
District Judge

[Endorsed]: Filed Sep. 7, 1948. Edmund L. Smith,
Clerk. [455]

[Title of Cause]

DOCKET ENTRY

4327-RJ WM

For recovery for overtime under Fair Labor Standards Act of 1938.

Attorneys:

For Plaintiffs: David Sokol.

For Defendant: Norman S. Sterry, Gibson, Dunn & Crutcher and Gail C. Larkin, E. W. Cunningham, Rollin E. Woodbury.

Date	Plaintiff's Account	Received	Disbursed
3/19/45	David Sokol	15 00	
4/11/45	Treas T4		15 00
6/29/48	David Sokol	5 00	
7/13/48	Treas		5 00
*	* * * * *	*	*

[456]

Date	Filings—Proceedings	Clerk's Fees Plain- tiff	Defend- ant	Amount Reported in Emolument Returns
3/19/45	Fld compl for wages liquidated damages, acctg & attys fees under Fair Labor Stds Act 1938. Issd summons Made Report J. S. 5	15	—	
3/23/45	Fld summons ret serv.			15 —

Date	Filings—Proceedings
4/ 7/45	Fld mot of dft to dismiss & to strike pors of compl, with not thereon ret 4/16/45 & auths in suppt.
4/12/45	Ent ord contg hrg on defts Motion to Dismiss to 10 AM 6/4/45. Notified counsel. Fld stip & ord thereon contg hrg deft mots; plfs to hv to & inc 4/23/45 to file amended compl, deft to hv to & inc 4/26/45 to amend mots.
4/12/45	Fld plfs auths in opp mot to dismiss.
4/26/45	Fld stip & ord thereon plfs hv to & inc 5/1/45 to file amended compl.
5/ 1/45	Fld amend compl.
5/ 4/45	Fld mot So. Cal. Edison Co. to dismiss & to strike & pors of amend compl, with auths in suppt & not mot ret 5/14/45.
5/ 8/45	Fld plf's pts & auths in oppos mot to dismiss & to strike.
5/14/45	Ent ord hrg on mots to dismiss and to strike go off cal until fur ord.
6/ 5/45	Fld substn Norman S. Sterry & Gibson, Dunn & Crutcher in addtn to Gail C. Larkin etal as attys for deft S. C. Edison Co.
6/23/45	Fld stip for amendmt to compl with ord thereon. Fld 2d amended compl. Fld stip & ord thereon deft SC Edison Co. hv to & inc 7/9/45 to plead or move to 2d amend compl.
7/ 9/45	Fld mots deft SC Edison Co. to dismiss & make 2d amended compl more def. & cert. & to strike portions 2d amended compl; with not mot ret 7/23/45, with pts & auths.

Date

Filings—Proceedings

- 7/11/45 Fld acknowlgmt by plfs of serv mots to dismiss etc.
- 7/13/45 Fld mot L. G. Hagerman to intervene; with not mot ret 7/23/45 & pts & auths; & lodged proposed compl. Fld plfs pts & auths in opp mot to dismiss etc. [457]
- 7/18/45 Fld depos of Eugene L. Ellingford tken 4/28/45 by defts, and plf's exhs 1, 2, & 3, to depos. Fld depos of H. S. Kaneen tken 4/28/45. Fld depos of Vernon B. Wert tken 4/28/45. Fld depos of H. L. Anderson taken 4/28/45.
- 7/23/45 Ent proc hrg and order denying Mo of deft to dismiss, and granting Mo to strike in part, and denying in part Mo to strike from 2nd Am Compl and denying Mo for more defin stmt (8).
- 8/ 9/45 Fld stip & ord ext time deft So. Calif. Edison Co. to answer interveners compl to & incl 8/23/45. Fld stip & ord ext time deft So. Calif. Edison Co. to answer 2nd amend compl to & incl 8/23/45.
- 8/22/45 Fld 2 stips & ords thereon deft Sou Calif Edison Co. hv to & inc 9/1/45 to file answer to interveners compl & to 2nd amended complaint.
- 8/30/45 Fld mot P. G. Hanlon et al to intervene as plfs; with not mot ret 9/10/45 & pts & auths.
- 8/31/45 Fld answer deft Southern Calif Edison Co., Ltd. to 2nd amended compl. Fld answer deft to compl in intervention of L. G. Hagerman.

Date

Filings—Proceedings

- 9/ 7/45 Fld stip & ord thereon P. G. Hanlon et al are allowed to intervene as & on 9/10/45 & adopt as compl in interven the 2nd amended compl on file herein, deft to file on or before 9/20/45 pleas of stat limitations.
- 9/12/45 Fld stip & ord that plfs hv to & incl 10/15/45 to plead to ans to 2nd amend compl & to ans to compl of Lawrence G. Hagerman, in intervention. Fld stip & ord permit L. W. Heinig to intervene as of 9/10/45 & to adopt as his compl the 2nd amend compl subj to terms of stip, etc. & deft permitted to file on or bef 9/25/45 such pleas of the statute limitations as it deems applicable to intervenor.
- 9/20/45 Fld supplemental answer SC Edison Co. to 2d amended compl as adopted by intervenors. [458]
- 10/ 1/45 Ent ord cont to 11/5/45, 10 a.m., for settg.
- 10/ 1/45 Fld stip & ord thereon plfs & intervenors hv to & inc 12/1/45 to move or plead to answ deft.
- 10/16/45 Fld Stip & Ord grant. permission of Floyd E. Downs at al, to intervene, etc.
- 10/23/45 Fld interrogs by plf to defts.
- 10/25/45 Fld supplemental answer to 2d amended compl by deft SC Edison Co., Ltd., setting up pleas stat limit as to cert intervenors.
- 10/26/45 Fld stip & ord thereon deft SC Edison Co. hv to & inc 11/30/45 to file objs to interrogs, and to hv to and inc 12/5/45 to file answs to interrogs.

Date

Filings—Proceedings

- 10/27/45 Fld stipulation and order thereon allowing Frank Johnson to intervene as of 10/22/45 and to adopt 2nd amend compl subject to conditions of stipulation & grtg deft in addn to its answer to file on or before 11/6/45 such pleas of the statute of limitations as it deems applicable to intervener.
- *9/ 4/45 Ent ord cont to 10/1/45, 10 a.m., for setting.
- 11/ 5/45 Ent ord contg 12/3/45 for setting for trial.
- 11/ 5/45 Fld stip & ord thereon allowg Robert C. Green & F. E. McClanahan to intervene as of 10/29/45 and to adopt as their compl the 2d amended compl on file, deft being given leave to file on or bef 11/10/45 pleas of stat of limitations.
- 11/ 6/45 Fld supplmntl answer of deft So. Cal. Edison Co. to 2nd amend compl, adopted by interveners Green & McClanahan. Fld suppl answer of deft So. Cal. Edison Co. to 2nd amend compl, as adopted by intervener Frank Johnson.
- 11/29/45 Fld stip & ord that deft may hv to and incl 12/5/45 to file objects to interrogs. Fld stip & ord cont setting to 1/7/46. [459]
- 12/ 3/45 Ent procs & ord made purs to stip htf fld on 11/29/45 cont to 1/7/46, 10 AM for settg for trial.
- 12/ 4/45 Fld 4 depositions; W. H. Culbertson, J. D. Borden, John M. Smith. & A. L. Honnell.
- 12/ 5/45 Fld answer and objections to interrogs propounded by plfs. Fld memo pts & auths in suppt deft's objec to answering cert questions.

Date	Filings—Proceedings
12/14/45	Fld stip & ord allg Sidney H. LaFond and F. D. Schwalbe to intervene as pltfs etc. Fld stip & ord allg Harlan E. Mayes to intervene as plts, etc.
12/26/45	Fld supplmtl ans of deft to 2nd amend compl adopted by intervener A. E. Fontaine. Fld supplmtl ans of deft to 2nd amend compl adopted by intervener H. E. Mayes. Fld supplmtl ans of deft to 2nd amend compl adopted by interveners S. H. LaFond and F. D. Schwalbe.
12/26/45	Fld stip & ord perm Arthur E. Fontaine to intervene as of 12/10/45 & to adopt 2nd amend compl & allow deft to ans on or before 12/31/45.
1/ 7/46	Ent ord contg 3/7/45 at 10 AM for pretrial hrg & setting.
1/11/46	Fld ord for pretrial hrg on 3/7/46 10 AM and prescribg proced; copy to counsel.
2/26/46	Fld order fxg 5/3/46, 10 AM as new pre-trial date. Notified attys.
3/14/46	Fld stip & ord gr perm H. J. Krekeles to intervene as of 1/31/46 & gr deft lv to file on or bef 3/25/46 fur pleas. Fld stip & ord gr perm E. M. Kirste, M. H. Untington & R. C. Greiner to intervene as of 1/18/46 & gr deft lv to file on or bef 3/25/46 fur pleas.
3/21/46	Fld ptf pretrial brief. Fld supplmtl ans to second amended complt, as adopted by certain interveners, settg up pleas of the statute of limits as to said interveners, H. J. Krekeles. [460]

Date

Filings—Proceedings

- 3/21/46 Fld supplmtl answer to second amended complt, as adopted by certain interveners, settg up pleas of the statute of limits as to said interveners, Edward M. Kirste.
- 4/29/46 Fld defts pre-trial brief.
- 4/30/46 Fld stip purs to pre-trial ord.
- 5/ 3/46 Ent proc on pre-trial hrg & ent ord contg to 9/9/46 at 2 PM for fur pre-trial hrg.
- 5/ 6/46 Fld stip & ord permittg G. H. Bartholomew, Merle Bartholomew, Loyd H. Bell, J. J. Bryan, Roye B. Johnson, J. W. McKernan, A. L. Neff, Fred C. Ray, Richard W. Rodenbeck, James C. Schrader, Harola A. Tunnell, and George C. Woolridge be permitted to intervene as of Mar. 21, 1946, and to have adopted the second amended complaint but subj to mots heretofore made by defendant So. Calif. Edison Co., Ltd., and that defendant has answered said complaint in intervention as to above interveners and defendant have to 6/15/46 to file pleas of statute of limitations as it deems applicable.
- 7/19/46 Fld supplmtl answer of deft to 2nd amend compl.
- 9/ 9/46 Ent ord cont 10/7/46, 10 AM for fur hrg on pretrial & for settg.
- 10/ 3/46 Fld & ent ord contg to 11/18/46 10 AM for fur pretrial.
- 10/21/46 Fld ord settg for trial 2/25/47, 10 AM. Notified attys.

Date	Filings—Proceedings
10/22/46	Fld stip that case be <i>be</i> set for trial on 2/25/47 or as soon thereafter as calendar permits, etc.
11/18/46	Ent proc on pretrial hrg. Fld 87 def't's Ex. Fld 5 ptf's Ex. Ent ord settg for trial 6/3/47 at 10 AM.
11/27/46	Fld in 4327-WM rptrs trans of proceedgs on pre-trial, dtd 11/18/46, consol.
4/29/47	Fld ord cont to 11/11/47 for trial. Notif. attys.
5/16/47	Fld req of plfs for adm of facts under Rule 36 FRCP.
5/19/47	Fld stip for subst of Nellie M. Johnson as plf instead of Frank Johnson, dec, with ord thereon. [461]
5/22/47	Fld stip & ord that dft hv to & incldg 7/1/47 to answer req for adm of facts, etc.
6/26/47	Fld not of hrg of defts mot to dismiss, retble 7/11/47, 10 am; motion to dismiss and pts and auths thereon.
6/30/47	Fld defts resp to req for adm of facts.
7/11/47	Ent proc on hrg mo to dismiss & ent ord granting with leave to ptf to amend the 2nd amended complaint by 8/15/47 and to file mo for summary judgt. Cause is reset for trial 2/3/48. Def't is allowed to 9/15/47 to respond to the motion and pltf shall have to 9/20 to reply. Counsel for def't to prepare formal order pur rule 7 in 5 days.

Date

Filings—Proceedings

- 7/25/47 Fld order granting def't's motion to dismiss with leave to file an amended complaint on or before Aug 15th 1947 if so advised. Pltf's are given leave to file a motion for summary judgment together with a memorandum of their points and authorities at any time before 8/15/47. Court has noted this cause on calendar September 22 1947 for purpose of hearing motions which may be addressed to the pleadings & directs all motions be noticed for said date, etc. Trial date of 11/11/47 is vacated and set for trial with 5544 for 2/3/48. Notified attys.
- 7/29/47 Fld stip & ord thereon ext time to & incl 9/1/47 within which pltf may file any amended compl or amendment to the 2nd amended compl or any mot for sum judg.
- 9/ 2/47 Fld affid of plfs in suppt of mot for partial sum jmt.
- 9/ 2/47 Fld third amended compl. Fld not of mot for partial summary judg purs to Rule 56, retble 9/22/47, with memo of facts and pts of law to sup thereof.
- 9/10/47 Fld stip re cert facts. [462]
- 9/16/47 Fld stip that def't hv to & includg 9/25/47 to file answer to 3rd amended complt, mot for sum jmt set for 9/22/47 be cont'd to 10/13/47 or any date to be set by court, etc.
- 9/17/47 Fld ord contg hrg on pltf's' motion for partial summary judgt to 12/9/47 at 10 AM. Notified attys.

Date	Filings—Proceedings
9/19/47	Fld plfs req for admissions. Fld plfs pre-trial brief.
9/25/47	Fld stip & ord thereon that deft have to & incl 9/29/47 to file its answer to third amended compl, etc. and that pltf's have to & incl 10/10/47 to reply to affids, etc.
9/29/47	Fld answer to third amended complt. Fld defts pts and auths in oppos to plfs mot for partial sum jmt. Fld affids on behalf of deft in oppos to mot for partial sum jmt.
10/ 1/47	Fld defts resp to req for adm of facts under Rule 36.
10/ 6/47	Fld demand of plfs for jury trial.
10/14/47	Fld rptrs trans of proceedgs.
10/22/47	Fld not of mot of deft of mot for sum jmt ret'ble 12/9/47 10 AM. Fld pts and auths in suppt of mot for sum jmt. Fld affid of G. R. Woodman.
10/27/47	Fld interrogs propounded by deft to plfs. Fld affid of serv of interrogs.
10/29/47	Fld defts req for admissions.
11/ 3/47	Fld stip and ord that plfs hv to & includg 11/13/47 to serv written objects to interrogs prev served, etc.
11/ 6/47	Fld stip and ord that plfs hv to & incldng 11/24/47 to file affids in oppos to defts mots, etc.
11/ 7/47	Fld plfs req for admissions.
11/13/47	Fld not of mot of plfs, ret'ble 11/24/47 of objects to defts interrogs and req for adms. Fld answer to defts req for admissions. [463]

Date	Filings—Proceedings
11/17/47	Fld stip and ord that deft hv to & includg 11/24/47 to answer req for adms.
11/21/47	Fld affid of Edgerton et al. Fld affid of plfs—substation operators. Fld affid of primary service men. Fld plf hydro employees answer to defts interrogs 66 thru 93.
11/24/47	Fld defts resp to plfs req for adms.
11/24/47	Fld plfs brief in oppos to defts mot for sum jmt.
11/24/47	Ent pro on hrg ptf objections to defts interrogs & requests for admissions & ent ord overruling objections to requests for admissions; ptf denies request for adm 13 and admits 14 & 15 in open court. Ent ord contg 12/4/47 at 1:30 PM for fur hrg on objections to interrogs. Ent ord contg hrg on motions for summary judgment to 12/18/47 at 10 AM.
12/ 4/47	Fld stip and ord that hrg on plfs objects to defts interrogs be cont'd to 1/5/48; that hrgs mots of plfs and deft for sum jmt be cont'd to 2/3/48; that trial of causes be cont'd to 4/13/48, 10 AM.
12/31/47	Fld stip and ord that plfs objects to defts interrogs set for 1/5 go off cal, etc.
12/31/47	Fld subst of attys for plf Edward M. Kirste; Fld not of subst of attys.
1/14/48	Fld addtl answers to deft's request for admissions. Fld pltf's answers to interrogs propounded by deft.

Date	Filings—Proceedings
1/26/48	Fld stip & ord that deft hv to & includg 3/3/48 to file exceptions to answers of plts to interrogs, etc.
1/27/48	Fld in 4327-WM original of stip re plfs answers to interrogs (copy in 5544-WM).
1/29/48	Fld not of deft of application for ord req plfs to answer interrogs, ct ord thereon not applic for 2/3/48.
2/ 2/48	Lodged defts stmt of facts.
2/ 3/48	Ent procon hrg motions of pltf & deft for summary judgt & ent ord contg 2/5/48 at 1:30 PM for fur hrg. [464]
2/ 5/48	Ent proc on fur hrg on mos for summary judgt and mo that ptfs further ans defts interrogs, and ent ord submitting.
2/27/48	Fld order fixing new trial date 7/6/48 at 10 AM. Notified attys.
3/19/48	Fld defts reply to plfs supplmtl memo pts and auths.
5/18/48	Fld ord denying defendant's motion requiring pltf to answer cert interrogatories ntfd attys Fld order denying motion of pltf for partial summary judgt and granting defendant's motion for summary judgt and directing counsel for deft to submit judgt dismissing action as to each pltf for lack of jurisdiction of the subject matter—and findings of fact and conclusions of law if so advised pur local rule 7 in 10 days. Ntfd attys.

Date	Filings—Proceedings
5/18/48	Fld defts statmt of evidentiary facts, etc; Fld defts collation of rec sustaining proposed findgs of fact; Fld (dupl) defts statmt of facts; Fld memo of auths where it is difficult to compute time, etc. Fld various letters re: pts & auths of mots for sum judgt.
5/27/48	Fld stip and ord that deft hv to & includg 6/14/48 to submit jmt, findings of fact, etc.
6/ 8/48	Fld & ent judgment of dismissal, COB 51/179. Doktd dism. Notif attys. MD JS-6.

Date	Filings—Proceedings	Clerk's Fees		Amount Reported in Emolument Returns
		Plain- tiff	Defend- ant	
6/29/48	Fld pltf's not of appeal affid svce by mail to defts atty. Fld \$250. Costs bond on appeal.		5 —	
7/ 1/48	Fld reptrs transc of procdgs 2/3/48.			5 —

Date	Filings—Proceedings
7/23/48	Fld plf-appls stnt of pts and desig of record.
8/ 2/48	Fld stip & ord extending period for flg & docketing rec on appeal to & incldg 9/25/48.
8/ 2/48	Fld stip & ord deft hv to & incldg 8/17/48 to file design rec on appeal.
8/17/48	Fld dfts desig addtl portions record on app.
9/ 7/48	Fld stip & ord re: design of rec on appeal & trans of orig papers. [465]

[Title of District Court and Cause]

STIPULATION

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto, that the defendant may forthwith file copies of the depositions of M. E. Roach and E. G. Eggers, both taken on the 25th day of September, 1945, and the depositions of Clarence Rogers and F. E. Griffes, both taken on the 28th day of September, 1945, with the Clerk of the United States District Court, and that for all purposes, it shall be deemed and treated as though the said depositions had been on file at all times respectively since the 5th and 8th day of October, 1945, and that said depositions may be transmitted as part of the Record on Appeal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the stipulation of the parties hereto on September 2, 1948 and the order of the Court on September 7, 1948. [466]

Dated: Los Angeles, California, this 14th day of October, 1948.

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD

By David Sokol

Attorneys for Plaintiffs

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry by

William French Smith

Attorneys for Defendant

ORDER

The foregoing stipulation is approved, and

It Is Ordered that said depositions shall be filed nunc pro tunc as within ten days of the dates on which they were taken, that is to say that the depositions of M. E. Roach and E. G. Eggers shall be filed nunc pro tunc as of the 5th day of October, 1945 and the depositions of Clarence Rogers and F. E. Griffes nunc pro tunc as of the 8th day of October, 1945; said depositions shall be a part of the record on appeal and included in the certification of the record on appeal by the clerk of this court.

Dated: Los Angeles, California, October 20th, 1948.

PAUL J. McCORMICK

Judge of the United States District Court

[Endorsed]: Filed Oct. 20, 1948. Edmund L. Smith,
Clerk. [467]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 467, inclusive, contain full, true and correct copies of Second Amended Complaint Under Fair Labor Standards Act of 1938; Notice of Motions to Dismiss and to Make the Second Amended Complaint More Definite and Certain and to Strike Portions of the Second Amended Complaint; Minute Order Entered July 23, 1945; Answer to Second Amended Complaint; Plaintiff's Interrogatories filed Oc-

tober 23, 1945; Answer and Objections to Interrogatories Propounded by the Plaintiffs, with Affidavits and Exhibits attached; Stipulation Required by Paragraph (3) of Order for Pretrial Hearing; Stipulation filed May 3, 1946; Request of Plaintiffs for Admission of Facts Under Rule 36 of the Federal Rules of Civil Procedure filed May 16, 1947; Motion to Dismiss Filed June 26, 1947; Notice of Hearing on Defendant's Motion to Dismiss; Defendant's Response to Request for Admission of Facts Under Rule 36 of the Rules of Civil Procedure; Order on Motion to Dismiss; Third Amended Complaint Under Fair Labor Standards Act of 1938 and the Portal to Portal Act of 1947; Plaintiff's Notice of Motion for Partial Summary Judgment; Affidavit in Support of Motion for Partial Summary Judgment; Plaintiff's Request for Admissions filed Sept. 19, 1947; Answer to Third Amended Complaint; Affidavits of G. E. Moran, C. R. Clark, R. E. Rice, J. G. Winkelpleck, William H. Short, J. D. Garrison, C. E. Pichler, R. G. Kenyon, and William C. Mullendore in opposition to Motion for Partial Summary Judgment; Defendant's Response to Request for Admission of Facts Under Rule 36 of the Rules of Civil Procedure filed Oct. 1, 1947; Demand for Jury Trial; Motion of Defendant for Summary Judgment; Separate Affidavits of C. E. Pichler, E. N. Husher, G. R. Woodman and J. A. Steller; Interrogatories Propounded by Defendant to Plaintiffs filed Oct. 27, 1947; Defendant's Request for Admissions filed Oct. 29, 1947; Plaintiffs' Request for Admissions filed Nov. 7, 1947; Objections to Interrogatories and Objections to Request for Admissions; Plaintiffs' Answer to Defendant's Request for Admissions; Affidavit of Merle M. Edgerton et al; Affidavit of Plaintiffs—Substation Operators; Affidavit of Primary

Service Men; Plaintiff Hydro Employees Answer to Defendant's Interrogatories 66 through 93; Defendant's Response to Plaintiffs' Request for Admissions filed Nov. 24, 1947; Plaintiffs' Answers to Interrogatories Propounded by Defendant; Additional Answers to Defendant's Request for Admissions; Notice of Application for Order Requiring Plaintiffs to Answer Interrogatories; Order on Defendant's Motion re Interrogatories; Order on Motions for Summary Judgment; Judgment of Dismissal; Notice of Appeal; Statement of Points and Designation of Record; Stipulation and Order re Extension of Time to file Counter-Designation; Stipulation and Order extending time to File Record and Docket Appeal; Defendant's Designation of Additional Portions of Record; Stipulation and Order re Designation of Record on Appeal and Transmission of Original Papers; Docket Sheets and Stipulation and Order re depositions which, together with copy of reporter's transcript of proceedings on November 18, 1946, July 11, 1947 and February 3, 1948; original defendant's Exhibits A, B-1 to B-12, C-1 to C-5, D-1 to D-4, E-1 to E-13, F-1 to F-26, G-1 to G-12, H-1 to H-12, I-1 to I-6, J-1 to J-12, K-1 to K-12, L-1 to L-12, M-1 to M-6, N-1 to N-12, O-1 to O-4, P-1 to P-36, Q-1 to Q-11, R-1 to R-12, S-1 to S-6, T, U, V, W, X, Y-1 and Y-2, Z, AA, AB-1 and AB-2; AC-1 and AC-2, AD, AE, AF-1 to AF-2, AG, AH-1 and AH-2, AI-1 and AI-2, AJ, AK-1 and AK-2, AL, AM, AN, AO-1 and AO-2, AP-1 and AP-2, AQ, AR-1 and AR-2, AS-1 and AS-2, AT, AU, AV-1 and AV-2,

AW-1 and AW-2, AX, AY-1 and AY-2, AZ-1 and AZ-2, BA-1 and BA-2, BB-1 and BB-2, BC-1 and BC-2, BD-1 and BD-2, BE, BF-1 and BF-2, BG, BH, BI, BJ-1 and BJ-2, BK-1 and BK-2, BL-1 and BL-2, BM-1 and BM-2, BO-1 and BO-2, BP-1 and BP-2, BQ, BR-1 and BR-2, BS-1 and BS-2, BT, BU-1 and BU-2, BV, BW-1 and BW-2, BX-1 and BX-2, BY-1 and BY-2, BZ, CA-1 and CA-2, CB-1 and CB-2, CC-1 and CC-2, CD, CE, CF-1 and CF-2, CG-1 and CG-2, CH, CI-1 and CI-2, CJ and Plaintiffs' Exhibits 1 to 5, inclusive, and original depositions of H. L. Anderson, J. D. Borden, W. H. Culbertson, Eugene L. Ellingford, L. M. Honnell, H. S. Kaneen, John M. Smith, Vernon B. Wert, E. G. Eggers, F. E. Griffes, M. E. Roach and Clarence Rogers, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$117.85 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21 day of October, A.D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

In the District Court of the United States for the
Southern District of California
Central Division

Honorable William C. Mathes, Judge Presiding

No. 4327WM—Civil

MYRON E. GLENN, et al.,

Plaintiff,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD.,

Defendant.

No. 5544WM—Civil

RAYMOND F. DRAKE, et al.,

Plaintiff,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD.,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

HEARING OF MOTION OF DEFENDANT TO
DISMISS

July 11, 1947

Appearances:

For the Plaintiffs: David Sokol, Esq.

For the Defendant: Gibson, Dunn & Crutcher; by
Norman Sterry, Esq., Rollin E. Woodbury, Esq.

Los Angeles, California, Friday, July 11, 1947,
10:00 A. M.

The Court: The motions are made in both cases?

Mr. Sterry: Yes, your Honor, the same motion is made. We filed points and authorities in the Glenn case, and stipulated they should be considered points and authorities in the other.

The Court: Yes. I have seen them. I would like to hear from Mr. Sokol. The question in my mind is, in view of the way this Act is framed, the Portal to Portal Act, whether a person seeking relief under the statute is not put to the necessity of pleading around the statute, so to speak. In other words, isn't it analogous to a person suing for fraud in the state court, more than three years after the fraud is practiced? He is put to the obligation of pleading around the statute.

Mr. Sokol: Rule 8 of the Rules of Civil Procedure, subsec. (1), requires a plain statement of the ground upon which the court's jurisdiction depends. We have done so.

The Court: Have you now, in view of the Portal to Portal Act?

Mr. Sokol: Your Honor, under Section 16(b) of the Fair Labor Standards Act, which has not been repealed, jurisdiction lies in this court. The only thing the Portal Act says is that when it comes to judgment the court cannot enter [2*] judgment. We have set forth jurisdiction in the court (2) a short and plain statement of the claim showing that the pleader is entitled to relief—a very plain statement under the rule.

We have shown (3) a demand for judgment.

The Court: I am referring to jurisdiction; not to the substance of the claim. I think they are two entirely

*Page number appearing in original Reporter's Transcript.

different questions. Congress has proceeded here to take jurisdiction away from the District Court, in a certain situation, hasn't it?

Mr. Sokol: Just in the entry of judgment.

The Court: The court would not sit idly and hear a cause, particularly one as involved as this, unless a showing is made that the court, if it entertained the case, would be able to accord some relief. That is the purpose that the requirement of jurisdiction be shown.

Mr. Sokol: Your Honor is questioning whether or not I should not, in the complaint, set forth that we come under a contract, custom or practice?

The Court: The Portal to Portal Act is an amendment to the statute, of course. I concede this is an anomalous situation. Apparently Congress was attempting to meet a constitutional objection by jurisdiction rather than meeting the subject by a substantive amendment. It says, this being a statutory court, created by statute, and having no [3] jurisdiction other than can be found in the statute, they have carved out part of that jurisdiction. The statement of the rules requiring a statement of facts upon which this court depends, is to show, and is the very question every federal court should ask when a suit is filed, where jurisdiction lies. In other words, it seems to me every plaintiff who files an action in the federal court is under an order to show cause, so to speak, why the court has jurisdiction.

Mr. Sokol: We will establish that the defense has supplied that in the pleadings.

The Court: Very well.

Mr. Sokol: If your Honor will turn to page 6 of the defendant's plea, it will be noted in the opening statement commencing on page 6—I know your Honor has read this

carefully—the defendant says that we are relying upon the Armour case. That is on page 5. On page 6, the Swift case, the Tennessee Coal and Iron case, the Jewel Ridge Coal case, and finally that famous—to some persons infamous—Mount Clemens case.

In the Jewel Ridge case there was a divided court, and at the bottom of page 6, discussing the Jewel Ridge case, counsel says: “Justice Jackson wrote a very vigorous dissenting opinion.” Your Honor, we are not relying upon the Jewel Ridge Coal case, nor the Tennessee case, nor are we relying upon the Mount Clemens case, but we are relying upon [4] Justice Jackson’s decision for the unanimous court, in the two cases, Armour and Swift.

The Court: Hasn’t Congress, in effect, reversed the Supreme Court on several of these matters, and made their decisions no longer current, in view of this statute?

Mr. Sokol: No, your Honor, not with respect to the Armour and Swift cases. Nowhere in the committee reports, or in any discussion whatsoever is any mention made, or attempted by Congress, to go around the decisions in the Swift and Armour cases.

The Court: Isn’t that the effect?

Mr. Sokol: No, your Honor. Your Honor is familiar with the Armour case. The court was unanimous in both those cases. It shows clearly why our type of action is not Portal to Portal. It is uniformly and clearly defined that the court was unanimous in the Armour and Swift cases, while in the Portal to Portal cases, the Tennessee Coal and Iron, and the Mount Clemens, there were most vigorous dissents.

In the Armour case the court said, unanimously:

“An employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to

happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and [5] time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer."

Let me emphasize that, your Honor. Let me show why Congress would have no authority to take away compensation for the time we are claiming. Take the case of the watchmen. Many of these people are mere watchmen in the substation. The employer says: I am going to hire you, Mr. X, as watchman. I am going to pay you one dollar an hour to come down and work. The watchman works eight hours, and only gets paid for four. Certainly, no one can deprive him of compensation.

The Court: Let me interrupt you. The question in my mind is not whether anyone may deprive that employee of a substantive claim. The question is, where may he go for relief? Does this court, not being a court of general jurisdiction, does this court, in the absence of a statute expressly conferring jurisdiction, have any jurisdiction to entertain his claim, assuming it is perfectly good and valid?

Mr. Sokol: Your Honor, our claim has been strengthened by the Portal to Portal Act.

The Court: I am not referring to the merits. I am referring particularly to jurisdiction.

Mr. Sokol: I want to develop this to show why there is a distinction between our type of claim; that Congress never intended to outlaw this type of claim, whether it was by [6] contract, custom, practice, or otherwise. What

they had reference to was portal to portal. I dare not leave the subject, because to me that is a very vital subject.

The Court: Doesn't a plaintiff in a suit, under the Act, now have to negative, in effect, by his pleading, the exclusion of the Portal to Portal Act?

Mr. Sokol: That is a negative pleading, your Honor.

The Court: It is the same situation you have in the state court. It is an anomalous situation. In equity we say the defense of laches is available when only two things are shown: One, the lapse of time, and two, prejudice to the defendant. In a fraud case the statute is three years from the discovery of the fraud. The courts have interpreted that to put the burden upon the plaintiff, (1) Why didn't he discover it? (2) Why didn't he discover it sooner? Here, instead of the statute of limitations, we have jurisdiction. Congress has created an anomalous situation, it seems to me, that the plaintiff has to deal in negatives, or facts showing negation, in order to show affirmatively jurisdiction.

Mr. Sokol: Let me answer the question directly, your Honor, and it is answered in the brief by the defendant. They have supplied the defect, on page 66 of their brief, if there is a defect (reading):

"It is perfectly true that the defendant, in its answer and in its pre-trial hearings at bar, has taken [7] the position that the monthly salary paid to each of the substation operators and attendants was for all the services which each of them rendered, of every kind and nature, and however described."

Let us turn to the answer, and let us see whether or not the defendant has not stated there was a contract to pay for this particular time. I refer to page 7 of the answer, subdivision (d).

The Court: The answer in the Glenn case?

Mr. Sokol: Yes.

Mr. Sterry: If your Honor please, if I remember, by stipulation in court, and order, entered in the minutes—a written order approved that the Drake case adopt the answer in the Glenn case, and your Honor stated the Drake case was merely a continuation of the Glenn case.

The Court: That is the effect, as I understand it.

Mr. Sterry: Mr. Sokol is continually intervening, and that is the matter we argued to your Honor on one or two hearings, and you reserved judgment; and I told Mr. Sokol we were not going to stipulate to any more interventions.

The Court: This is the original answer?

Mr. Sokol: Yes, your Honor, page 7, subdivision (d).

The Court: Answer to the second amended complaint, page 7?

Mr. Sokol: I have just the original answer in the [8] Glenn case.

The Court: That answer was interposed to the second amended complaint, I think.

Mr. Sokol: Yes.

The Court: Page 7, what line?

Mr. Sokol: Line 22, your Honor:

“Defendant alleges that the plaintiffs listed and described as primary service men were paid a monthly salary, the amount of which provided an hourly wage in excess of that provided for by the Act, and that said salary was paid to and received by each of said plaintiffs as full payment for all services, whether active or inactive.”

The same allegation is made with respect to substation operators on page 9. The answer, in other words, alleges,

your Honor, that there was a contract; that they are relying on a contract whereby they paid a monthly wage for all services, active and inactive, admitting they did not pay overtime for the inactive portion.

Your Honor, we have been in this court approximately three years. I am not going to appeal on that ground, but I appeal on the fundamental ground that as to pleadings in the federal court, contrasted with the state court, we have a very liberal rule in the interests of justice.

The Court: Yes. Mr. Sokol, I am talking about the [9] jurisdiction.

Mr. Sokol: I maintain that the defect has been supplied by the pleadings, and further, by the answer to the interrogatories. What must the plaintiff do in the federal court? He must apprise the other party of the claim; whether or not they come within the jurisdiction of the court.

The Court: I am only talking about jurisdiction. What facts must the complaint show in order to show jurisdiction in this court?

Mr. Sokol: There are facts in the answer which supply the jurisdictional material now required under the Portal to Portal Act. If we alleged we had a contract with the defendant whereby they agreed to pay for active and inactive time, and that they did not pay the overtime for inactive time, there is no question of any kind that we would come under the Portal to Portal Act. The defect is further cured by the answer to the interrogatories. I refer to page 7 of the Answer to Interrogatories. I will read that to the court:

"They had no scheduled working hours and were subject to call during twenty-four hours per day during the regular scheduled working days."

Here is another jurisdictional defect that has been cured, your Honor:

“The active duties which were required of them would not take more than two to five hours per day, and the [10] company believes and contends that their entire employment was regarded by them and by the company as the equivalent of the employment of eight hours.”

In other words, the company takes this position: No. 1. We had a contract whereby we paid them a salary for all of their active and inactive time. No. 2. They were required to be on the premises twenty-four hours a day, but they only worked three or four hours. Now you have a custom and practice of paying for stand-by time.

The Court: That is going into the merits of the case.

Mr. Sokol: That is all we can argue, your Honor, if we are going to give facts. It is alleged in an affirmative way by the defendant.

The Court: In other words, your view is, even though the rules require a short and plain statement of the facts upon which jurisdiction depends, the court may look to the defendant's answer in aid of an omission in the plaintiff's pleadings?

Mr. Sokol: For the reason, even though we admit jurisdiction, and the defendant supplies the defect, we have these wonderful rules of procedure in the federal court, which safeguard a plaintiff who has a claim. That is why the District Court has said that all you have to do is to afford fair notice to the adversary of the nature and basis of the claim. As I view the new rules they do not go upon technicalities. [11]

The Court: Jurisdiction is never a technicality.

Mr. Sokol: May I point out in this instance it is a technicality. We have been in court three years. Now the Portal to Portal Act is passed, which doesn't say we have to assert jurisdiction in a different court.

The Court: Is there anything to prevent Congress, if the Congress wished to pass an Act saying the District Court would have no jurisdiction over any matters except those arising under patent laws of the United States?

Mr. Sokol: Frankly, I don't think it is necessary to go into the constitutional phase.

The Court: Would there be anything, in your view, to prevent Congress from doing that?

Mr. Sokol: I think it would never occur. We still have public opinion to that extent.

The Court: I am referring, not to what Congress might do, but what Congress could do.

Mr. Sokol: Mr. Sterry says that Congress has that right.

Mr. Sterry: The authorities I have cited fully sustain that.

Mr. Sokol: Your Honor, the defect is further cured in the depositions taken of those persons, which are before the court.

The Court: If the pleadings can cure the jurisdiction, and aid the absence of definiteness of the jurisdictional nature in the plaintiff's complaint, the portions you have called [12] attention to probably do so, if that is the basis of the plaintiff's claim. The plaintiff claims jurisdiction rests in this court because this claim sought to be enforced here is compensable by virtue of the contract.

Mr. Sokol: Yes, contract, custom and practice. The defendant contends there was a contract whereby they were paid a salary for all active and inactive time. The

defendant says: They only worked two or three hours a day, and we paid them a salary for all this time.

The Court: Is there anything in the other pleadings, or in the interrogatories, that would supply the missing allegation that this time for which recovery is sought was compensable by virtue of practice or custom?

Mr. Sokol: Yes, your Honor. We have finally gotten a little further along in this case, and it appears now, since the defendant has filed its answer to requests for admissions,—I believe there is now hardly any question but what the employees are subject to the Act upon the question of commerce. I refer now to page 3, line 30 of the Answer to Request for Admissions; and your Honor will note the defendant has already admitted that the substation men and relief men were paid salaries for a twenty-four hour day for active and inactive time.

Mr. Sterry: We have not. We allege there was an implied contract that there should be an equivalent of a period [13] of eight hours, and we paid them a monthly salary to cover that. If they want to join with us and concede that that was the contract, the claim that they had actually worked under it, we will meet that issue. That is the purpose of this motion. I want to know what their theory is.

The Court: Does the defendant contend that the employees agreed, expressly or impliedly, to accept a monthly salary as an eight hours' pay, and to treat all the work they did throughout the month as equivalent to an eight hour day?

Mr. Sterry: That is the substance of it.

Mr. Sokol: Are you stipulating now that you paid them the salary for an eight hours' day?

Mr. Sterry: No, I am not making any stipulation.

Mr. Sokol: You will so stipulate?

Mr. Sterry: No. I will meet your argument. Pardon the interruption.

The Court: Is the situation, Mr. Sterry, such that the defendant here is in fact saying although the men may have worked more than the equivalent of eight hours a day over a given month, they agreed to accept monthly pay?

Mr. Sterry: No, we don't say that. I don't think the answer is susceptible to that effect.

The Court: You would rather say instead that the employees agreed that this from time to time work they did at various hours throughout the month—the employees in fact [14] stipulated that it was the equivalent for an eight-hour day for all working days throughout the month?

Mr. Sterry: Our theory always has been that the conduct amounted to an implied agreement between the parties that it was an eight hour job, and we paid them for that.

The Court: Let me understand. It was the equivalent of an eight hour job in time spent?

Mr. Sterry: They did not spend the eight hours in any active duty. It was the equivalent of eight hours.

The Court: Even though some months it might be more, and some months less, or some weeks more, and some weeks less?

Mr. Sterry: That is getting into the evidence. We don't claim an express agreement.

The Court: I was referring to the agreement you mentioned. I wanted to be sure that I understood.

Mr. Sterry: The only fair interpretation of the pleadings, if your Honor please, of the defendant's answer, is that the actual active duties, anything that they actually did that could be considered ordinarily a duty, did not take

over two to five hours a day; that they had no restraint on them, except that they could not leave the premises. It was impliedly agreed that was the equivalent of an eight hour day, and they were paid for that. The plaintiff has always insisted we paid for eight hours, and they were entitled to six or eight hours standby, and that has not been paid for. [15]

The Court: The plaintiff's contention is, as you have stated, that they were paid on the basis of eight hours a day for all the working days of the month, but were not paid for duties performed over and above eight hours a day, is that right?

Mr. Sokol: That is correct.

The Court: Let us go back to the question of aid to jurisdiction, stated by defendant's pleadings and responses to interrogatories. Is there anything which supplies the missing allegation?

Mr. Sokol: The answer does: "It was agreed between each of said plaintiffs and the defendant that the said monthly salary should be full payment for normal services of each said plaintiff, whether active or inactive."

The Court: Let us assume that the defendant's pleading may aid the defective allegations of the facts upon which the jurisdiction of this court depends,—is that the contract on which the plaintiffs base their claim to recover? As I understand it, plaintiffs would deny vigorously that there was any such construction.

Mr. Sokol: This is our position, and I will be willing to stipulate to a summary judgment on the record as it stands right now. We believe the record is complete, with the depositions and exhibits in the case.

The Court: You would have to make a motion for a summary [16] judgment.

Mr. Sokol: I realize that, and I am offering this to Mr. Sterry.

The Court: Do the plaintiffs seek recovery here under the contract which the defendant pleads, or do the plaintiffs deny that any such contract existed?

Mr. Sokol: We rely upon the contract to this extent: That the defendant contracted to pay these employees, but did not pay them in accordance with the Act for any time in excess of eight hours a day.

The Court: Isn't it true, Mr. Sokol, that plaintiffs do not seek to recover under any such contract as is pleaded by the defendant?

Mr. Sokol: I would not say that. We are relying upon the fact that the defendant has—

The Court: Do you agree that the contract was the contract which the defendant has pleaded; that it contains the stipulation which the defendant pleads it contains?

Mr. Sokol: There are other facts in it. That is only part of it.

The Court: Do you agree on that?

Mr. Sokol: With the additional facts, as I will point out.

The Court: That is not the question here, though. Assuming that the defendant's answer can aid the defective [17] statement of jurisdiction, or facts upon which jurisdiction depends, isn't the question here, whether the defendant has pleaded the contract, assuming the plaintiff's claim is a contract,—has the defendant pleaded the contract under which plaintiff seeks to recover?

Mr. Sokol: The defendants have pleaded the contract in their answer.

The Court: Let us return to that contract now. That is on page 7, subdivision (d) of the answer, is it?

Mr. Sokol: Page 8, line 9.

The Court: Is that a correct statement of the contract under which the plaintiff seeks to recover?

Mr. Sokol: Together with other statements which they are making in the pleadings, and, specifically, your Honor, it is set forth in the brief also. I will say it this way, your Honor: It clearly relates to the accounting methods in the payment of wages, that being part of the contract. They have set that up; the method of payment; upon what basis payment was made.

The Court: Does plaintiff concede, for example, that one of the terms of the contract under which plaintiffs seek to recover in this case is because of the nature of the employment, it was agreed between the substation operators and the defendant that evaluating the employment as a whole, the inactive duties of the plaintiffs and the normal active duties [18] were the equivalent of eight hours of service?

Mr. Sokol: No.

The Court: Then this is not the contract upon which the plaintiffs seek to recover?

Mr. Sokol: Yes, it is. They paid these people a monthly salary. We rely upon their statement of the facts in the answer, and their statement of actual facts.

The Court: These are part of the facts. I just read them from the answer.

Mr. Sokol: But your Honor has to take into consideration their answer to the interrogatories, whereby they stated they compute the hourly rate on the basis of 48 hours a week.

The Court: That is implicit in this pleading, of what the contract was, that they computed the hourly rate of 48 hours a week, isn't that right?

Mr. Sokol: Your Honor is correct.

The Court: Mr. Sokol, if you feel advised to make a motion for a summary judgment, I will postpone the disposition of this motion until that time.

Mr. Sokol: I will do so, your Honor.

The Court: It seems to me, if the plaintiffs here seek to recover by virtue of the contract, and the practice and custom, the time that they claim is claimed to be compensable, that those are facts upon which the jurisdiction of this court depends, in view of the Portal to Portal Act. It is an [19] anomalous situation, but that's the way I read it. It seems to me it would be very dangerous practice for the plaintiff to proceed otherwise, and it would be a waste of time, because every time this court goes through the motion without jurisdiction, it is a waste of time.

Mr. Sokol: Your Honor, I would like to do that. I think both sides can file a motion for a summary judgment.

The Court: You contend, do you, Mr. Sokol, that there are no substantive issues of fact remaining to be disposed of?

Mr. Sokol: Yes.

The Court: In view of the admissions in the pleadings and in the answers to the interrogatories.

Mr. Sokol: And the answer to Requests for Admissions.

Mr. Sterry: If your Honor please, may I make a brief statement? I am not going to talk on the merits of the case, but I want your Honor to bear this situation in mind; I want to read the statute, because you have to determine the merits for your jurisdiction. It is an anomalous situation:

“No employer shall be subject to any liability or punishment under the Fair Labor Standards Act

* * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by [20] either—

“(1) an express provision of a written or non-written contract”—that is not an implied written contract—“in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

“(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, and not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.”

The custom must be not inconsistent with the contract.

“(b) For the purpose of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable. * * *

“(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the [21] failure of the employer to pay minimum wages or overtime compensation * * *

to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

Your Honor, may I give one thought which is in my points and authorities, which I think your Honor overlooked? Your Honor made the statement that Congress had evidently put that in to bolster up the constitutionality of the Act. I think that is the popular conception. I don't believe that was the primary object, for the reason I state in my points and authorities.

Under the general rules of pleading I am not at all concerned, so far as the sufficiency of the complaint is concerned.

Congress was going on the basis, and from the fact that our country was flooded with these suits, the time of the court was being unnecessarily consumed, and enormous expenses were being paid, and that hence, if they were permitted to proceed with all these under such general allegations as appear in this complaint, half of the purposes of the Act would be defeated.

This case, I think, would cost \$25,000.00 to prepare, in actual cost, to say nothing of the indirect costs.

I think that was put in for the express purpose of making them come out [22] directly and saying whether or not this was a case within the Fair Standards Act. If they put in the allegation that that is not true, you can join the issue, and then determine it. That was the purpose of this motion.

Let me address myself particularly to the pleadings, because I don't think on this motion your Honor can determine the merits of the case. Let me go one step further. Mr. Sokol has said, under Rule 16 all you have to

do is to make a statement of jurisdiction, and he did that at the time. Now the Fair Labor Standards Act has come in. It is not only a saving clause, but the primary object of Congress was to wipe out pending so-called Portal to Portal cases, because such jurisdiction is withdrawn, and hence the necessity of showing jurisdiction.

The complaint alleges, your Honor, that it involves more than \$3,000.00. Your Honor could not proceed in such a situation. It would be an injustice not to give them a chance to amend. May I call your attention to the conflicting claims, as I have understood them, and I stated them fairly in my points and authorities, and Mr. Sokol, has not challenged them.

The plaintiffs contend that by virtue of the fact that they were required to remain upon the premises of the defendant for 24 hours a day they were under employment restraint under the Armour & Skidmore cases, and were entitled to time and one-half of their usual rate for 16 hours a day. I think [23] we can discard eight, because the decision of the Circuit Court of Appeals, in which certiorari has been consistently denied, as a matter of law establishes they are not entitled to eating and sleeping time. It has always been the rule that they were not entitled to that time.

Our answer, as Mr. Sokol has pointed out, and as we point out, and as we always intend to point out, simply says we paid a monthly salary. I don't think we used the word "impliedly." It says it was agreed. There was no express agreement. It depended on the circumstances, and everything else. Mr. Sokol has always contended that we show a different situation. Reading from our answer:

"Defendant further alleges that because of the nature of the employment, it was understood and agreed be-

tween each said substation operator and attendant and the said defendant that, evaluating the employment as a whole, the inactive duties of each said plaintiff and the normal active duties were the equivalent of eight hours of service."

For which we paid them; and we also paid them overtime for anything performed during the night time hours. That was the allegation, and it was not denied.

If that were the contract, and they wanted to join with the contract, and say that was the contract, perhaps there would be the question of summary judgment, because under this [24] Act, if they said it was not the equivalent of eight hours, but was the equivalent for ten or twelve hours, then for that extra time you have no contract or no custom, to pay.

They are claiming they were paid for eight hours a day. They do not claim or admit they agreed to it. If they came in here and said: This is the contract that we sued on, that we allege, then we might be willing to meet them on the question of law as to the right to recover. Furthermore, if, instead of that, they alleged they were paid for all their time, and it amounted to more than ten hours, then they can't recover more than one-half of their time.

They claim that they have apprised us of their claim. They have not. It is not fair to this court, or to us. Let us know upon what theory they are now proceeding, because since this Act has been passed the law has been changed. One of two things is true: If our theory is correct, and their contract with us is as we allege and claim, then they stand out of court, without any recovery. I don't claim the court can decide that on our pleadings, but they certainly can't come in on our pleadings and say we agreed it was an eight hour job, and we paid them for

that, and any services in the night time. They can't say they can have jurisdiction of this court under the statute which says you can't proceed with any suit on activities which were customary, and not by contract.

Mr. Sokol made one statement, I think inadvertently, when [25] he said it was never intended to have this apply to any situation such as this. I want to read to your Honor again just exactly what was overlooked, appearing on page 69. If your Honor please, I again refer to the history of this legislation. The Senate drafted a bill which dealt only—I think it was 71; I am not quite certain of the number—which dealt only with pending claims, and they labeled it Portal to Portal. It was so limited. If that bill had been enacted by Congress we would not have been here this morning, because it would not have covered this case. I might want to retract that later, because I haven't read that bill for some time, but my impression is, as I read the Senate bill, that the bill was never enacted. The House passed the bill, that is, so far as pending claims were concerned. In some of these bills, so far as future claims were concerned, the language was different. It passed overwhelmingly. It went to the Senate. The Senate Judiciary Committee revised it by striking out everything the House did, and rewrote the bill, and then it was passed in accordance with the conference report. Sections 6 and 7, written by the Senate Committee, are the same, substantially, as Section 4 of this bill. It deals with future claims. In the House the following occurred:

“Mr. Hinshaw. The gentleman remembers the cases known as the stand-by cases which were brought out before his committee in which certain employees might be called [26] upon at some time not during their regular working time to perform some duty and

that many suits for wages have been instituted under that type of claim. Is that provided for in the present bill?

"Mr. Walter. Yes; we feel that under the language of section 2 (b) of this bill that type of arrangement is covered and that the employer is not liable.

"Mr. Hinshaw. The case I had in mind was one where there were certain persons who were left to guard electrical distribution stations where they were given a house and so forth and perhaps performed one or two labors per day and yet were paid on a monthly basis. Large suits were brought for time and a half for an additional 8 hours per day pursuant to the ruling of the court.

"Mr. Walter. We hope that we have met that situation and all of the situations that have been brought to our attention, because we had in mind that all of these portal-to-portal suits are in the nature of windfalls. None of the plaintiffs—and I say that advisedly—ever felt they were entitled to compensation for activities which are the basis of these suits."

This, of course, stands admitted here. These people entered our employ and accepted a monthly salary and overtime service for night time. Then when the Armour and Skidmore [27] cases came out they said they had not been paid for the services, and brought this suit.

What do they allege? They allege that they have performed overtime work more than 40 hours a week. When suit was brought, I thought it should be made more definite and certain. Judge Harrison, who heard the motion, did not think so, and denied the motion to make it more definite and certain. We proceeded on that theory. I .

challenge Mr. Sokol to say if it is not so, if actually their services were more than eight hours per day, they should be given some additional time. How much would be for your Honor to say, after you heard the evidence, if you thought it was in excess of eight hours, for that extra time he claims they haven't been paid, and were entitled to half. They would not be entitled to time and a half if their salary had been received by them in full compensation for everything, whether six or eight or twelve hours a day.

Our answer comes in. We have been consistent throughout. You can't find a single inconsistency in our answer, in our admission to interrogatories, or anything. We said: We employed you to do certain active services, which we don't think take more than two to five hours a day. You are allowed to stay on the premises. During that time you can do anything you please. You can engage in any activities that can be performed on our premises.

The Court: You are going into the merits, aren't you? [28]

Mr. Sterry: Yes. I am simply stating our position. So they had no restraint on that at all, except they could not leave the premises, and we agreed that was the equivalent of eight hours' service, for which we paid them, and which they accepted.

The Court: Is the contract with the defendant pleaded?

Mr. Sterry: The contract with the defendant is pleaded and relied on. They don't accept it. I think we have a right to know, and the court has a right to know what their position is. Do they claim they have a contract? There is a custom. They can take several positions, your Honor. I am not stating whether they can recover on them, but they are at liberty in the pleadings to take this

position, that they were actually under employment restraint for 24 hours a day, excluding sleeping and eating of eight to ten hours. They have, therefore, six to eight hours a day overtime for which they want time and a half, and they either have been paid their hourly rate for it, or they haven't been paid their hourly rate for it. If they take that position, we will meet that with the proper motion.

The next position they take is that they had a contract, such as we have alleged, but that actually there were more than eight hours a day, and it amounted to ten or twelve or fourteen hours,—whatever they want to claim, and that that was not paid for. We have a right to meet that both by motion [29] and answer. It is an injustice to this court and to ourselves.

We will have to make a motion to dismiss for want of jurisdiction, but I don't anticipate, nor anticipate that the court would grant that motion, except giving them the right to amend. Suppose this motion were denied. We then would have to go to an enormous expense, trying the case, just as though this Portal-to-Portal Act had not gone through. In fairness to them, to the court, and to everybody else, they should amend.

Mr. Sokol: Apparently you agree if we amend, and set up certain allegations, at least we can recover one-half?

Mr. Sterry: No, I have never agreed that.

The Court: Let us stay off the merits of the matter. Mr. Sterry has pointed out, as I understand it, that you rely upon a contract. You rely upon a custom and practice. The jurisdiction of this court will depend upon a statement to this effect, and he stated the ground of jurisdiction would have a highly beneficial effect of apprising the defendant of precisely the contract, and precisely the custom and practice upon which the plaintiff relies.

Mr. Sokol: I stated I would resolve this by submitting the matter for a summary judgment. I am content to do that. Your Honor, we started this action three years ago. What did we say in the complaint? We said we relied wholly and completely upon the records of the defendant. There is no [30] information of any kind or character we can supply.

The Court: Don't misunderstand me. The statement is only incidental of the grounds upon which jurisdiction depends. It also serves to apprise the defendant of precisely the basis of the claim. It seems to me that is the way the Portal-to-Portal Act was drafted. Perhaps, as Mr. Sterry suggested, it was done so definitely, without regard to meeting any constitutional question, but for the sole purpose of enabling the defendants to compel the plaintiffs to specify with particularity the grounds of the claim. Mr. Sokol, you won't agree that the contract which the defendant pleaded is the contract which you claim?

Mr. Sokol: I do so agree, your Honor, together with the express agreement which is in evidence.

The Court: If you agree to that, you are out of court, aren't you?

Mr. Sokol: No.

The Court: The defendant says, we contracted with these plaintiffs, and both parties agreed that due to the nature of the work, and the inherent inability to keep accurate time, it would all be considered eight hours. Do you agree that that is the contract?

Mr. Sokol: No, your Honor.

The Court: Then that is not the contract under which the plaintiffs seek to recover, is it? [31]

Mr. Sokol: This is the contract—

The Court: Then you must plead it.

Mr. Sokol: It has already been presented in evidence.

The Court: Has it been pleaded? Is it in the complaint?

Mr. Sterry: Mr. Sokol, if it were not for the fact that your error would also be my error, I would permit you to go ahead on that basis.

Mr. Sokol: I am perfectly willing.

The Court: Even if you are willing, I am not. I am going to sustain the motions upon the first ground, and give you leave to file an amendment to the second amended complaint, stating precisely the ground upon which the jurisdiction of this court depends, in view of the Portal-to-Portal Act, and that, as I conceive it, would be a precise statement to show that the claim is compensable within the meaning of the Portal-to-Portal Act, under such contract. It seems to me it would be incumbent upon the plaintiffs to plead the contract under which they claim; to plead the custom and practice upon which they rely.

Mr. Sokol: Your Honor has ruled; but I believe the chief executive of this nation, when he signed this Act, spoke for the courts of the land, and for our whole nation. I would like to have an opportunity, before your Honor rules, to develop that further. I think the ruling of this court takes a position which is contrary to the Chief Executive's opinion. [32]

The Court: In view of that remark, Mr. Sokol, I want to ask you this question: How can this court, in the face of the second amended complaint, determine whether the time for which compensation is sought falls within the exclusion of the Portal-to-Portal Act, or not?

Mr. Sokol: I would be very content to submit it on a summary judgment.

The Court: How can the court determine whether the time claimed is claimed under a contract, written or unwritten, or is claimed under some custom or practice sanctioned by the Act?

Mr. Sokol: That is a matter of proof.

The Court: That is, custom or practice for which recovery is sanctioned. What harm can come to these plaintiffs by filing a two-page amendment to the complaint, saying we claim that the contract under which we are entitled to recover was this; or we claim that the custom or practice under which we are entitled to recover is that? Can any harm come?

Mr. Sokol: Only this, your Honor; we are actually relying upon the records of the company, and it is for the court to interpret those records. I will merely attach those as exhibits, and say that is the contract we are relying upon.

The Court: Then the defendant will have plaintiffs on record, and more important, the court would have before it the contract under which the plaintiffs claim that Congress has expressly given this court jurisdiction. Or, to put it [33] negatively, the court will know that the claim asserted is not a claim to which Congress has recently deprived this court of jurisdiction.

Mr. Sokol: May we have 30 days?

Mr. Sterry: If your Honor please, may I answer that thus: In all my years of practice I have never met an opponent that has been more courteous than Mr. Sokol. I am willing to give him any time he wishes, and while I don't like to bring personal matters in, I am just a little worried about myself recently. My nerve energy has been exhausted, and I do want to arrange for some time to be away. If this goes over to the 11th of August, then we will have to file some motions, and it might not be possible to take it up until in September. I am more than willing to have him granted that time, but in that event I should like to have it understood that the matter should not be heard before the 1st of January.

The Court: I take it, in view of what Mr. Sokol said this morning, since the contract under which the plaintiffs claim is already here, that he very likely will move for summary judgment.

Mr. Sterry: If I could be certain that within the next 30 days I will file pleadings in conformity with his statements here, I would have no more concern about this case. My apprehension is between now and 30 days. There will be an entire change of theory. I am perfectly willing that counsel should [34] have any reasonable time he wants.

Mr. Sokol: I think I can do it in 20 days.

The Court: Let it be understood that should any motions be noticed, that they be noticed early in September.

Mr. Sterry: I will notice them early in September. Then I want it understood, Mr. Sokol, that if the matter should not be disposed of, and there are any motions, and there should be issues claimed, then I will notify you, and I may ask for a short continuance of the trial.

Mr. Sokol: Can I respectfully request a date? I intend filing the motion for a summary judgment at the time I amend.

The Court: I can hear the motions on September 5th, and I will set aside that time, if you are confident you are going to file that motion.

Mr. Sterry: If your Honor please, I don't think having the matter on the 5th of September, that I can possibly be prepared, without sacrifices both professionally and personally, which I am unwilling to make.

The Court: Let us choose another date.

Mr. Sterry: I would suggest any time after January. (Further discussion as to setting.)

The Court: I will enter an order at this time vacating the setting heretofore made for Tuesday, November 11, 1947, and reset the cases for trial on February 3rd, 1948.

* * * * *

[Endorsed]: Filed Oct. 14, 1947. Edmund L. Smith, Clerk. [35]

[Endorsed]: No. 12070. United States Court of Appeals for the Ninth Circuit. Myron E. Glenn, et al., Appellants, vs. Southern California Edison Company, Ltd., Appellee. Transcript of Record. Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 22, 1948.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 12070

(D. C. Civil Action No. 4327-WM)

MYRON E. GLENN, et al.,

Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD., a corporation,

Defendant-Appellee.

STIPULATION EXTENDING PERIOD FOR FIL-
ING AND DOCKETING RECORD ON APPEAL

It Is Hereby Stipulated by and between the attorneys
for the respective parties hereto:

The time for filing the record on appeal and docketing
the action in the Circuit Court of Appeals for the Ninth
Circuit is, subject to the approval of the Court, extended
to and including October 25, 1948.

Dated: September 23, 1948.

DAVID SOKOL and

PACHT, WARNE, ROSS & BERNHARD,

By Bernard Reich

Attorneys for Plaintiffs-Appellants

NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER and
GAIL C. LARKIN,
E. W. CUNNINGHAM and
ROLLIN W. WOODBURY

By Norman S. Sterry
Attorneys for Defendant-Appellee

It Is So Ordered.

Dated: September 27, 1948.

CLIFTON MATHEWS

United States Circuit Court Judge

[Endorsed]: Filed Sep. 27, 1948. Paul P. O'Brien,
Clerk.

United States Court of Appeals for the Ninth Circuit

No. 12070

MYRON E. GLENN, et al.,

Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD., a corporation,

Defendant-Appellee.

No. 12071

RAYMOND F. DRAKE, et al.,

Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD., a corporation,

Defendant-Appellee.

ORDER DISPENSING WITH PRINTING OF CER-
TAIN PORTIONS OF THE RECORDS ON AP-
PEAL

Upon the application of Pacht, Warne, Ross & Bern-
hard by Bernard Reich, attorneys for the plaintiffs-appel-
lants in the above entitled actions, and upon the affidavit
of Bernard Reich, sworn to the 12th day of November,
1948, in support of the said application, and the consent
of Norman S. Sterry, Esq., one of the attorneys for the
defendant-appellee in the above entitled actions, and upon

the entire record and proceedings in this court; now, therefore,

It Is Hereby Ordered that the following papers now on file in the office of the Clerk of the above entitled court and which have been designated by one or the other of the parties as part of the records on appeal need not, however, be printed:

(a) All depositions.

(b) All exhibits introduced and as shown by the index to the reporter's transcript of the pretrial hearing dated November 18, 1946, including but not limited to the exhibits enumerated in defendant's specification #17 of its "Defendant's Designation of Additional Portions of Record", dated August 17, 1948, marked Defendant's Exhibits "A" through "CJ".

Said depositions and exhibits shall nevertheless be considered as part of the records on appeal and may be referred to and reproduced in the respective briefs of counsel.

Dated: San Francisco, California, November 15, 1948.

WILLIAM DENMAN

Chief Judge, U. S. Court of Appeals for the
Ninth Circuit

[Title of United States Court of Appeals and Cause]

No. 12070 No. 12071

AFFIDAVIT OF BERNARD REICH IN SUPPORT
OF APPLICATION FOR AN ORDER DIS-
PENSING WITH PRINTING OF CERTAIN
PORTIONS OF THE RECORDS ON APPEAL

State of California

County of Los Angeles—ss:

Bernard Reich being first duly sworn, deposes and says:

1. I am an attorney and counselor at law duly admitted to practice in all of the courts of the State of California, the United States District Court for the Southern District of California, the United States Circuit Court of Appeals, now the United States Court of Appeals for the Ninth Circuit, and am one of the attorneys for the plaintiffs-appellants in the above entitled actions.

2. The Clerk of the United States District Court has transmitted to this court the records on appeal in the above cases, including certain original papers, namely, depositions and exhibits.

3. On October 11th and 12th, 1948, the parties, through their attorneys and by an exchange of letters, stipulated that the defendant could include in the records on appeal four depositions which had not been filed but to which counsel for the defendant had referred in the course of his argument on defendant's motion for summary judgment, and the parties, likewise through their attorneys, stipulated that the call-out sheets, other, like and cumbersome exhibits and the depositions, subject to the

approval of the Court, need not be printed except that the depositions or parts of them might be made part of the appendix of the briefs or that those parts of the depositions would be printed to which counsel might wish to refer in their briefs.

4. This Court has extended the time mentioned in Subdivision 6 of Rule 19 of the Rules of the United States Court of Appeals, Ninth Circuit, to December 1, 1948, upon the parties' stipulation, through their attorneys, that they desire to present to the Court as simple and as short a record as is possible under the circumstances, and that certain of the exhibits need not be printed, and that none of the depositions need be printed except either as part of the appendix to the several briefs or except those parts to which counsel may wish to refer in their briefs.

5. These appeals come to the Court from orders in the nature of summary judgment dismissing the complaints. The matters were about to go to trial after extended depositions, interrogatories and requests for admissions had been made and answered when the orders and judgments appealed from were made by the Court below. The records on appeal, therefore, are most extensive and include, among other things, 12 depositions and possibly over 50 exhibits, the latter being part of the pretrial had below.

6. The plaintiffs and appellants in these cases are poor working people and employees of the defendant-appellee. Most of them make less than \$200.00 a month upon which to support themselves and their families. As counsel, we

have been advised by them that they do not have any money with which to finance the appeals. The Clerk of this court has advised us that the printing costs, if all of the record is printed, will amount to a little under \$4000.00, and this on appeals from judgments dismissing the complaints without trial.

7. As stated, the defendant does not oppose this application but on the contrary, through counsel, has once stipulated in an exchange of letters to dispense with the printing of these original documents on file with this court.

8. Attached hereto and made a part hereof is the original of a letter dated November 10, 1948, and signed by Mr. Norman S. Sterry as attorney for the defendant-appellee, consenting to an order dispensing with the printing of portions of the records as indicated.

9. It will be noted that Mr. Sterry speaks of a conversation with Mr. O'Brien. It occurs to your deponent that Mr. Sterry had apparently neglected, quite inadvertently, to relate all of the facts and circumstances of these cases to Mr. O'Brien.

10. The elimination of a great deal of unnecessary printing, it would seem to your deponent, not only would make it possible for the plaintiffs-appellants to perfect their appeals, but would be in complete conformity with the very character of the Fair Labor Standards Act which is the basis for the suits herein. Provisions for costs and attorneys' fees strongly indicate that it was the sense of Congress that employees suing under the said Act should

be given every consideration in order to sustain valid and existing claims.

11. Your deponent respectfully prays that the Court make and enter its order as proposed herein.

BERNARD REICH

Sworn to before me this 12th day of November, 1948.

(Seal)

ANNA TAYLOR

Notary Public in and for Said County and State

GIBSON, DUNN & CRUTCHER

Lawyers

634 South Spring Street

Los Angeles 14, California

MUtual 5381

* * * * *

November 10, 1948

Mr. Bernard Reich
9700 Wilshire Boulevard
Beverly Hills, California
My dear Mr. Reich:

Re: Glenn vs. Southern California Edison Company, Ltd.
Drake vs. " " " " "

I am writing this letter because I am leaving town to be gone until after the 1st day of December. I left about the middle of October for a very much needed vacation, but an injury to my leg, which resulted in a bad infection, kept me on my back for about three weeks of the time, necessitating my flying down here for hospitalization. Hence, since I have now recovered I am anxious to get back to the Rogue for the balance of this month.

Before my departure in October we had several discussions regarding the portions of the record which should be printed, and you wanted a stipulation to the effect that the printing of these depositions could be dispensed with and we agreed we would make such a stipulation, subject to the approval of the court, or would read through the depositions and designate the printing of only those portions we thought necessary to our defense. As I did not expect to be back before the 1st of December and could not undertake that work (and there was no one else who could do so) before I left, we stipulated for an extension of time within which to file the record to sometime in January, but the court cut the time down to the 1st of December.

You sent me a stipulation providing, among other things, that the depositions need not be printed. I have not signed it for the reason that I discussed the matter with Mr. O'Brien over the telephone and he stated to me that he felt that it was proper for us to stipulate that the exhibits introduced at the pretrial hearing of November 8, 1946, consisting of charts showing the call-out time and the digest of logs should not be printed, but that he did not think that the depositions should be so handled and did not believe the court would approve such stipulation. I am, therefore, prepared to designate the portions of the depositions on which we will rely, which will be the major portions of said depositions.

If you can obtain an order from the court dispensing with the printing of these depositions and providing that

they be a part of the record to be considered by the court on appeal, that will be perfectly agreeable to me. You have stated that you thought we could print such portions of the depositions in the appendix to our brief or in our brief. I do not want to have to lengthen the brief by printing in the brief itself or in the appendix portions of the depositions. Due to the fact that the depositions are, of course, in the form of question and answer, we might have to print five or six pages to establish a simple fact that can be stated in a half dozen words with appropriate citations to the record. If the court is willing to dispense with the printing of the depositions and will allow us to refer to the depositions by citing the page and line, that will be perfectly agreeable to me, and this letter is written to confirm that, so that you can make application for dispensing with the printing of those depositions on condition they be and remain a part of the record. From what Mr. O'Brien stated to me, I do not believe you can obtain such an order and unless the court will make such an order we shall designate the portions of the depositions we rely on, which, as I have stated, will be the principal portions of those depositions.

Very truly yours,

Norman S. Sterry

NSS-gw

Norman S. Sterry

[Endorsed]: Filed Nov. 15, 1948. Paul P. O'Brien,
Clerk.

United States Court of Appeals for the Ninth Circuit

No. 12070

MYRON E. GLENN, et al.,

Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD., a corporation,

Defendant-Appellee.

APPELLANTS' STATEMENT OF POINTS AND
DESIGNATION OF PORTIONS OF RECORD
FOR PRINTING

To the Clerk of the Above Entitled Court, to the Defendant-Appellee Above Named, and to Its Attorneys, Gail C. Larkin, E. W. Cunningham, Rollin E. Woodbury, Norman S. Sterry, Gibson, Dunn & Crutcher, Esqs.:

The following is the concise statement of points on which plaintiffs-appellants intend to rely on the appeal herein:

Statement of Points

I.

The trial Court erred in granting defendant-appellee's motion for summary judgment.

II.

The trial Court erred in not making and filing findings of fact and conclusions of law.

III.

The trial Court erred in dismissing the action for lack of jurisdiction of the subject matter of the action.

IV.

The trial Court erred in ruling that plaintiffs-appellants were not entitled to overtime compensation under the Fair Labor Standards Act of 1938, as amended.

V.

The trial Court erred in ruling that the certain activities alleged to have been engaged in by each plaintiff-appellant employed were made non-compensable by the Portal-to-Portal Act of 1947.

VI.

The trial Court erred in ruling that the Portal-to-Portal Act of 1947 was and is constitutional generally and as applied to the facts in this case.

VII.

The trial Court erred in ruling that defendant-appellee's motion for summary judgment should be granted.

VIII.

The trial Court erred in ruling that the action seeks to impose a liability upon the defendant employer as to each plaintiff-appellant for alleged activities which were not compensable within the purview of subsections (a) and (b) of section 2 of the Portal-to-Portal Act of 1947.

IX.

The trial Court erred in ruling that under subsection (d) of said section 2 of the Portal-to-Portal Act of 1947 the Court is without jurisdiction of the subject matter of said action.

Designation of Record for Printing

Plaintiffs-appellants designate for printing in the record on appeal the following:

* * * * *

Dated: November 22, 1948.

DAVID SOKOL and

PACHT, WARNE, ROSS & BERNHARD,

By Bernard Reich

Attorneys for Plaintiffs-Appellants.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 26, 1948. Paul P. O'Brien,
Clerk.

No. 12071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND F. DRAKE, et al.,

Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD.,

Appellee.

TRANSCRIPT OF RECORD

Appeal From the District Court of the United States
for the Southern District of California,
Central Division

FILED

FEB - 4 1949

PAUL P. O'BRIEN,
CLERK

No. 12071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND F. DRAKE, et al.,

Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD.,

Appellee.

TRANSCRIPT OF RECORD

Appeal From the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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E. W. CUNNINGHAM

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1113 Edison Building

Los Angeles 13, California [1*]

In the District Court of the United States for the
Southern District of California
Civil Action No. 5544-WM

RAYMOND F. DRAKE, W. W. BENNETT, F. V.
BRIMMER, HAROLD E. COLLINS, and other
employees similarly situated,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD., a corporation,

Defendant.

COMPLAINT UNDER FAIR LABOR STANDARDS
ACT OF 1938

Plaintiffs, by way of Complaint, allege as follows:

I.

Plaintiffs bring this action against defendant under and by virtue of an Act of Congress of the United States of America entitled "The Fair Labor Standards Act of 1938" (Act of June 28, 1938, C-678, 58 Stat. 1080; U. S. C., Title 29, Section 201, et seq.), hereinafter called the Act.

II.

Jurisdiction is conferred upon the Court by Section 16(b) of the Act. Plaintiffs allege that, pursuant to Section 16(b) of the Act, they are maintaining this action for and in behalf of themselves and other employees similarly situated.

III.

The defendant, Southern California Edison Company, Ltd., [2] at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City of Los Angeles, County of Los Angeles, State of California, where said corporation is engaged in the generation, distribution and sale of electric power. During all the time and periods mentioned herein, the defendant Southern California Edison Company, Ltd., distributed and sold electric power within the State of California, which is generated at its California plants and at its Boulder Dam, Nevada, plant; said defendant, during the period herein set forth, distributed, sold and delivered electric power in excess of Twenty-five Million Dollars (\$25,000,000.00) annually to shipbuilding companies, aircraft manufacturers, oil producers, steel producers, aluminum producers, railroads, municipalities, the United States Army, the United States Navy, radio stations, telegraph offices, telephone offices, interstate transportation companies, interstate airline transportation companies, and to hundreds of concerns engaged in the manufacture of goods for interstate commerce, which concerns, at all times herein mentioned, did use the said electric power, sold and distributed and delivered to them by the defendant to carry on their activities in interstate commerce and in the production of goods for interstate commerce.

IV.

That the plaintiffs and all the other employees of said defendant, Southern California Edison Company, Ltd., similarly situated to the plaintiffs during all the times herein mentioned were, and now are, engaged in processes and occupations necessary to the generation, distribution, and sale of the aforesaid electric power by said defendant in interstate commerce, and the plaintiffs and other employees of the defendant, similarly situated to the plaintiffs during the times herein mentioned, were engaged in processes and occupations necessary to the production, distribution [3] and sale of goods in interstate commerce by the customers of said defendant as hereinabove alleged.

V.

That since October 24, 1938, the effective date of the Fair Labor Standards Act, defendant employed the following-named persons, the plaintiffs herein, in the respective capacities and classifications set out herein after their names, to wit:

<u>Name</u>	<u>Classification</u>
Raymond F. Drake	Substation Attendant
W. W. Bennett	Substation Attendant
F. V. Brimmer	Substation Attendant
Harold E. Collins	Substation Operator

VI.

That on frequent occasions since the effective date of the Act, October 24, 1938, plaintiffs and other employees

similarly situated to them employed by the defendant, were employed by the defendant for certain hours in excess of the work-weeks established by Section 7 (a), (1), (2), and (3), of said Act; that the defendant failed to pay the compensation for overtime hours in excess of the work-weeks prescribed by the provisions of said Section; that the dates of employment, number of hours and amounts of compensation for such overtime for the plaintiffs and other employees similarly situated, is a matter reported on the books kept by the defendant; plaintiffs have no complete and accurate record of said dates, hours and compensation claimed to be due, owing and unpaid from the defendant to the plaintiffs and other employees similarly situated, and, accordingly, an accounting should be rendered by the defendant to the plaintiffs from the time that plaintiffs and other employees similarly situated were so employed to the date that this action is adjudged, to determine the amount of said claims. That all of the records of said dates, [4] hours and compensation claimed to be due, owing and unpaid from defendant to the plaintiffs and other employees similarly situated, are in the possession of the defendant, Southern California Edison Company, Ltd. That there is due and owing and unpaid from the said defendant to the said plaintiffs and other employees similarly situated, such compensation for the time during which they and each of them were employed in excess of the work-weeks established by said Act in such amounts as shall be determined by said accounting.

VII.

That the plaintiffs and other employees similarly situated, are entitled to additional sums equal to the amounts claimed by them, as liquidated damages by virtue of the provisions of Section 16(b) of the Act; that plaintiffs have employed David Sokol, Attorney, duly authorized to practice in the above-entitled Court, and by virtue of said Section 16(b) said attorney is entitled to be awarded a reasonable attorney's fee herein.

Wherefore, plaintiffs pray that the defendant be required to account to plaintiffs and other employees similarly situated to plaintiffs, and each of them, for the total number of hours which each has been employed, up to and including the date that this matter shall be determined, in excess of the minimum work-weeks prescribed by said Act, and the amount of compensation that is required to be paid by said Act, and that upon said sums being computed, a judgment be entered for the plaintiffs and other employees similarly situated to plaintiffs and each of them, and against defendant for such amounts as the accounting will show that they are entitled to receive, together with an additional amount as liquidated damages, and in addition, a reasonable sum for attorney's fees.

DAVID SOKOL

Attorney for Plaintiffs

[Endorsed]: Filed Jul. 10, 1946. Edmund L. Smith,
Clerk. [5]

[Title of District Court and Cause]

NOTICE OF MOTIONS TO DISMISS AND TO
MAKE THE COMPLAINT MORE DEFINITE
AND CERTAIN AND TO STRIKE PORTIONS
OF THE COMPLAINT

Comes now the defendant Southern California Edison Company, Ltd., a corporation, and moves the Court as follows:

I.

For an order dismissing the said action upon the ground that the said complaint does not state a claim upon which relief can be granted to the plaintiffs or any of them.

II.

For an order dismissing the said action upon the ground that the said complaint does not state a claim upon which relief can be granted to the plaintiffs or any of them in that it does not appear that the plaintiffs or any of them, were engaged in [6] interstate commerce or in the manufacture of goods for interstate commerce.

III.

For an order dismissing the action as to all unnamed parties upon the ground:

1. That the plaintiffs are not authorized to bring a class action or to sue for on behalf of any other employees.

2. That Section 16(b) of the Act (Section 216 United States Labor Code) does not authorize a representative or class action, but merely joining in the same suit separate actions of individual employees.

3. That it be necessary for the defendant, in order to properly prepare for trial, to know the precise plaintiffs whose claims it is to meet.

IV.

In the event the foregoing Motion No. III is denied, for an order dismissing the action as to all unknown parties who do not, within thirty days from the date hereof, or such other time as the court shall fix, intervene in said action, upon the grounds (1) stated in said foregoing Motion No. III; (2) that the plaintiffs are not authorized to prosecute or maintain this action on behalf of anyone other than themselves; that a similar action by Myron E. Glenn and others against this defendant has been pending for considerably more than a year, and a large number of employees and former employees of defendant have intervened in said action; that the issues therein so far as substation operators and attendants are concerned are the same as the issues presented in this action; that the said case of Myron E. Glenn, et al vs. Southern California Edison Company, Ltd., is at issue and ready to be set for trial, and that this action should be consolidated with it for trial; and that it is necessary for the defendant in order to properly prepare for trial as to any employee other than those instituting this suit and the said Glenn suit or intervening therein to know exactly the employees or former employees [7] of the defendant who will be parties to either of said actions, in order that it may properly prepare for trial.

V.

For an order requiring the plaintiffs to make the complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

How or in what manner the plaintiffs or any of them performed work, labor or services for the defendant in interstate commerce, or in the manufacture of goods for interstate commerce.

VI.

For an order requiring the plaintiffs to make the complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The character of work and the normal hours of work of those plaintiffs designated as substation operator and attendant.

VII.

For an order requiring the plaintiffs to make the complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The character of work and normal hours of work of those plaintiffs designated as primary servicemen.

VIII.

For an order requiring the plaintiffs to make the complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The approximate time and the number of excess hours which it is claimed each plaintiff was employed by the said defendant.

IX.

For an order requiring the plaintiffs to make the complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The amount of overtime compensation claimed to be due [8] each plaintiff which it is claimed defendant failed to pay each said plaintiff.

X.

For an order requiring the plaintiffs to make the complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

The amount which it is claimed is due, owing, or unpaid from the defendant to each of said plaintiffs.

XI.

For an order requiring the plaintiffs to make the complaint more definite and certain, or to give the defendant a bill of particulars upon the following point:

Approximate length of time since October 24, 1938, the effective date of the Fair Labor Standards Act, each of said plaintiffs continued in the employ of defendant and continued as a substation attendant.

XII.

For an order to strike from Paragraph III of said complaint, page 2, lines 11-12, the words and figures:

“in excess of Twenty-five Million Dollars (\$25,000,000.00).”

Said motion being made upon the ground that said words are incompetent, irrelevant and redundant and allege no fact that it would be competent or relevant for the plaintiffs to prove at the time of the trial and does not afford any guide as to the volume or amount of electrical power distributed, generated or sold to alleged companies, or persons alleged to be engaged in the manufacture of goods for interstate commerce.

XIII.

For an order striking from the complaint, Paragraph II, page 1, lines 28-30, the words: [9]

“Plaintiffs allege that, pursuant to Section 16(b) of the Act, they are maintaining this action for and in behalf of themselves and other employees similarly situated.”

from Paragraph IV on page 2, lines 24-26, the words:

“and all the other employees of said defendant, Southern California Edison Company, Ltd., similarly situated to the plaintiffs”

from Paragraph IV on page 2, lines 30-31, the words:

“and other employees of the defendant, similarly situated to the plaintiffs”

from Paragraph VI on page 3, lines 16-17, the words:

“and other employees similarly situated to them”

from Paragraph VI on page 4, line 2, the words:

“and other employees similarly situated”

and from Paragraph VII on page 4, lines 10-11, the words:

“and other employees similarly situated,”.

Said motion is made (1) upon the grounds that said words are redundant and irrelevant; that plaintiffs have no right to prosecute this suit for any person or persons other than themselves; and (2) upon all the grounds set out in support of defendant's third motion.

XIV.

For an order striking from the complaint, Paragraph VI, page 3, lines 28-32, the words:

“ an accounting should be rendered by the defendant to the plaintiffs from the time that plaintiffs and other employees similarly situated were so employed to the date that this action is adjudged, to determine the amount of said claims.”

Said motion will be made upon the ground that the words [10] moved to be stricken are redundant, irrelevant and immaterial; that the plaintiffs are not entitled to bring an action for an accounting; that the action authorized by the statute is an action at law to recover compensation claimed severally to be due the several plaintiffs for excess hours which it is alleged and claimed the several plaintiffs were employed and were not paid for, and for liquidated damages resulting from such non-payment; that the burden is upon each of the plaintiffs to establish the respective claim of each said plaintiff.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd.

1113 Edison Building, Los Angeles,
California [11]

To: David Sokol, Attorney for Plaintiffs Named Herein:

Please Take Notice That the undersigned will bring the above motions on for hearing before this Court in Courtroom No. 4, United States Courts and Post Office Building, the City of Los Angeles, California, on the 9th day of September, 1946, at 2:00 o'clock P. M., in the afternoon of that day or as soon thereafter as counsel can be heard.

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd.

1113 Edison Building, Los Angeles,
California [12]

Received copy of the within Notice of Motions this 27 day of Aug. 1946. David Sokol, Attorney for Plaintiffs.

[Endorsed]: Filed Aug. 28, 1946. Edmund L. Smith,
Clerk. [13]

[Title of District Court and Cause]

ORDER

The several motions of the defendant to dismiss the said Complaint, or in the alternative, to make the same more definite and certain, came on regularly for hearing before the Honorable Wm. C. Mathes, Judge, on the 18th day of November, 1946.

Plaintiffs and interveners appeared by David Sokol, Esq., their counsel, and the defendant by Norman S. Sterry, Esq., and Rollin E. Woodbury, Esq., its counsel. Said motions were presented to the Court and argued by the respective counsel, and the Court [14] being advised thereon, It Is Ordered:

(1) That defendant's motions Nos. I, II, III, V, VI, VII, VIII, IX, X, XI, XIII and XIV, are each severally denied.

(2) That defendant's motion No. XII to strike from the complaint on file herein the words and figures:

"in excess of Twenty-five Million Dollars (\$25,000,000.00),"

is hereby granted.

(3) That defendant's motion No. IV for an order dismissing the action is granted, as follows: Said action is dismissed as to all unknown parties who do not, on or before the 1st day of April, 1947, intervene in said action.

(4) That defendant is given until the 15th day of December, 1946, in which to file its answer to the said complaint herein, and to the various interventions, each intervenor having, by stipulation of the parties, adopted the said complaint as his complaint in intervention; and pur-

suant to stipulation and agreement of counsel made in open court, It Is Further Ordered that the defendant may, if it so elects, adopt as its answer in the above entitled cause its answer filed in the suit of Myron E. Glenn, et al, Plaintiffs, vs. Southern California Edison Company, Ltd., a corporation, defendant, No. 4327-WM, or any part of such answer.

(5) It appearing to the Court that the above entitled action is similar in many respects to the case of Myron E. Glenn, et al, Plaintiffs, vs. Southern California Edison Company, Ltd., a corporation, Defendant, No. 4327-WM, and that the issues of fact and law presented in the above entitled action are substantially the same as some of the issues of fact and law presented in the said case of Myron E. Glenn, et al, Plaintiffs vs. Southern California Edison Company, Ltd., a corporation, Defendant, No. 4327-WM, and that the time of Court and of the parties will be conserved by the cases being tried together, and counsel for the respective parties having [15] agreed in open Court that the cases should be consolidated and tried at the same time, and the said case of Glenn v. Southern California Edison Company, Ltd., No. 4327-WM, having heretofore been set for trial on the 25th day of February, 1947, and continued by the Court until the 3rd day of June, 1947,

It Is Hereby Ordered that the above entitled cause of Raymond F. Drake, et al, Plaintiffs, vs. Southern California Edison Company, Ltd., a corporation, Defendant, No. 5544-WM, be, and the same hereby is, consolidated for trial with the said case of Glenn v. Southern Cali-

fornia Edison Company, Ltd., No. 4327-WM, on the said 3rd day of June, 1947.

Done in Open Court this 29 day of November, 1946.

WM. C. MATHES

Judge of the United States District Court

Approved as to Form: November 25, 1946. David Sokol, Attorney for Plaintiffs and Interveners.

[Endorsed]: Filed Nov. 29, 1946. Edmund L. Smith, Clerk. [16]

[Title of District Court and Cause]

ANSWER

Comes now the defendant in the action above entitled and for answer to the complaint as filed by the plaintiffs named in said complaint and as adopted by each intervener herein:

I.

Admits that the plaintiffs and interveners other than the plaintiff F. V. Brimmer and Earl Fred Skinner, intervener, were employed by the defendant as substation attendants during some of the times referred to in said complaint. As to the plaintiff F. V. Brimmer, defendant admits that for a portion of the time he was employed as a substation operator, and for a portion of the time he was employed in the defendant's hydro division. Admits that the said intervener Earl Fred Skinner was employed by the defendant as a [17] substation operator, but denies he was so employed at any time within three years preceding the bringing of the above entitled action.

II.

Defendant denies that any of said plaintiffs or interveners performed any services for it of any character in excess of 40 hours per week or any work or services for which they and each of them have not been fully paid.

III.

The above entitled action having been consolidated with the case of Myron E. Glenn et al v. Southern California Edison Company, Ltd., No. 4327-WM, hereinafter in this answer referred to as the "Glenn case," defendant, as its answer to the complaint herein, adopts as fully as though here set out the First Answer and Defense in the Glenn case other than subparagraph (b) of paragraph I thereof (the allegations in the complaint herein to which said subparagraph (b) would respond having been stricken from the complaint in this action).

For a Further, Second, Separate and Distinct Answer and Defense, and by way of a plea of estoppel:

I.

Defendant adopts as fully as though herein set forth the Second, Separate and Distinct Answer and Defense in said Glenn case.

For a Further, Third, Separate and Distinct Answer and Defense:

I.

Defendant adopts as fully as though herein set forth the Third, Separate and Distinct Answer and Defense in said Glenn case. [18]

For a Further, Fourth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that under Subdivision 1 of Section 340 of the Code of Civil Procedure the cause of action is barred so far as any liquidated damages to the plaintiffs are concerned as to any recovery for services prior to July 10, 1945, performed by said plaintiffs or any of them, and as to the interveners Earl Fred Skinner and C. H. Booker said cause of action is barred so far as any liquidated damages to said interveners are concerned as to any recovery for services prior to September 5, 1945, performed by said interveners or either of them, and as to the intervener Cecil B. Jordan said cause of action is barred so far as any liquidated damages to said intervener are concerned as to any recovery for services prior to November 12, 1945, performed by said intervener.

For a Further, Fifth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that under Subdivision 1 of Section 339 of the Code of Civil Procedure the cause of action is barred as to the plaintiffs herein as to any recovery for services prior to July 10, 1944, performed by said plaintiffs or any of them, and as to the interveners Earl Fred Skinner and C. H. Booker said cause of action is

barred as to said interveners as to any recovery for services prior to September 5, 1944, performed by said interveners or either of them, and as to the intervener Cecil B. Jordan, said cause of action is barred as to said intervener as to any recovery for services prior to November 12, 1944, performed by said intervener. [19]

For a Further, Sixth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that under Subdivision 1 of Section 338 of the Code of Civil Procedure the cause of action is barred as to the plaintiffs herein as to any recovery for services prior to July 10, 1943, performed by said plaintiffs or any of them, and as to the interveners Earl Fred Skinner and C. H. Booker said cause of action is barred as to said interveners as to any recovery for services prior to September 5, 1943, performed by said interveners or either of them, and as to the intervener Cecil B. Jordan said cause of action is barred as to said intervener as to any recovery for services prior to November 12, 1943, performed by said intervener.

For a Further, Seventh, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that under Subdivision 1 of Section 339 of the Code of Civil Procedure the cause of action is barred entirely as to the intervener Earl Fred Skinner.

For a Further, Eighth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that under Subdivision 1 of Section 338 of the Code of Civil Procedure the cause of action is barred entirely as to the intervener Earl Fred Skinner.

Wherefore, defendant prays that plaintiffs and interveners take nothing by this action; for its costs of suit herein, and for such other and further relief as to the court may seem [20] just in the premises.

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd.

STIPULATION

The above case having been consolidated for trial with the case of Myron E. Glenn et al v. Southern California Edison Company, Ltd., No. 4327-WM, referred to in the answer and herein as the "Glenn case," and the said issues in this case being the same as the issues entered in the Glenn case so far as the plaintiffs and interveners therein alleged to be substation operators are concerned, and the defenses that the defendant desires to plead being the same as set up in its answer,

It Is Hereby Stipulated by and between the parties that the said defendant may, as it has in said answer, adopt by reference the various portions of the answer in the Glenn case as set out in the foregoing answer, and that the said portions of the answer in the Glenn case, as set out in said answer, may be deemed for all purposes to have been incorporated in the answer of the defendant herein with the same force and effect as though they had been set out in the defendant's said answer. [21]

Dated: Los Angeles, California, December 14, 1946.

DAVID SOKOL

Attorney for Plaintiffs and Internevers

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd.

The foregoing stipulation is in accord with an Order of the Court heretofore made and is approved.

Dated: Los Angeles, California, December 16, 1946.

WM. C. MATHES

Judge, United States District Court [22]

Received copy of the within Answer and Stipulation this 14 day of Dec. 1941. David Sokol, Attorney for Plaintiffs and Interveners.

[Endorsed]: Filed Dec. 16, 1946. Edmund L. Smith,
Clerk. [23]

[Title of District Court and Cause]

SUPPLEMENTAL ANSWER

Comes now the defendant Southern California Edison Company, Ltd., and pursuant to the stipulation on file herein and order of court made thereon whereby Howard A. McCloud and John W. Simpson were permitted to intervene as of the 5th day of March, 1947, and to adopt the complaint on file herein as their complaint in intervention, and the defendant was deemed to have adopted its answer thereto with permission to file such pleas of the statute of limitations as it deemed applicable to the said interveners, files this, its pleas of the statute of limitations as follows:

For a Further, Ninth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations: [24]

I.

Defendant alleges that the cause of action is barred so far as any liquidated damages claimed by the said interveners are concerned under Subdivision 1 of Section 340 of the Code of Civil Procedure as to any recovery for services prior to the 5th day of March, 1946, performed by said interveners, or any of them.

For a Further, Tenth, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that the said cause of action is barred as to the said interveners under Subdivision 1 of Section 339 of the Code of Civil Procedure, as to any recovery for services prior to the 5th day of March, 1945, performed by said interveners, or any of them.

For a Further Eleventh, Separate and Distinct Answer and Defense, and by way of plea of the statute of limitations:

I.

Defendant alleges that the said cause of action is barred as to said interveners under Subdivision 1 of Section 338 of the Code of Civil Procedure, as to any recovery for services prior to the 5th day of March, 1944, performed by said interveners, or any of them.

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd. [25]

Received copy of the within Supplemental Answer this 15th day of April, 1947. David Sokol, Attorney for Plaintiffs.

[Endorsed]: Filed Apr. 15, 1947. Edmund L. Smith,
Clerk. [26]

[Title of District Court and Cause]

REQUEST FOR ADMISSION OF FACTS UNDER
RULE 36 OF THE FEDERAL RULES OF
CIVIL PROCEDURE

To the Defendant and Its Counsel:

Please Take Notice that pursuant to Rule 36 of the Federal Rules of Civil Procedure, you are requested to admit, within 15 days after service upon you of this demand, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the following:

1. That the plaintiffs and interveners in the above entitled action were at all times engaged in work and processes necessary to the production of goods in interstate commerce.

2. That the plaintiffs and interveners were at all times engaged in work necessary to the transmission of electric power and energy in interstate commerce.

3. That plaintiffs and interveners substation relief operators were required by defendant to relieve substation operators on days off, vacations and in emergencies. [27]

4. That the plaintiffs and interveners substation relief operators were required by defendant to live at the substation where they were relieving, and remain on duty for 24 hours each day while relieving substation operators.

5. That plaintiffs and interveners substation relief operators lived in special relief quarters furnished by the defendant.

6. That the plaintiffs and interveners were required by the defendant to record on weekly time sheets only 8 hours per day normal working time.

7. That the plaintiffs and interveners were permitted to enter on their weekly time sheets additional time worked only in emergencies.

8. That the plaintiffs and interveners were not compensated for time worked except for the time actually recorded on the weekly time sheet.

Dated, Los Angeles, May 15, 1947.

DAVID SOKOL

Attorney for Plaintiffs and Intervenors [28]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 16, 1947. Edmund L. Smith, Clerk. [29]

[Title of District Court and Cause]

MOTION TO DISMISS AND POINTS AND
AUTHORITIES IN SUPPORT THEREOF

Comes now the defendant, Southern California Edison Company, Ltd., and with leave of Court first had and obtained, because of the enactment of the Portal to Portal Act of 1947 subsequent to the joining of issue in the above-entitled matter, moves this Court to dismiss the above-entitled action, upon the grounds:

One. That this Court has now no jurisdiction of the subject matter of the action and has not had

jurisdiction of the subject matter of the action since the effective date of the said Portal to Portal Act of 1947;

Two. That the complaint fails to state a claim upon [30] which relief can be granted and has failed to state such a claim since the effective date of the said Portal to Portal Act of 1947.

Said motion will be made upon all the files and papers in said cause and upon the Points and Authorities filed in support of an identical motion in the case of Myron E. Glenn, et al., vs. Southern California Edison Company, No. 4327-WM, copies of which said Points and Authorities have been served herewith upon you.

Dated: Los Angeles, California, June 26, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd.

[Endorsed]: Filed Jun. 27, 1947. Edmund L. Smith,
Clerk. [31]

[Title of District Court and Cause]

NOTICE OF HEARING ON DEFENDANT'S
MOTION TO DISMISS

To the Plaintiffs in the action above entitled, and to
David Sokol, Esq., their attorney:

You, and Each of You, Will Please Take Notice that the undersigned attorneys for the defendant, Southern California Edison Company, Ltd., will bring on for hearing said defendant's Motion to Dismiss, dated June 26th, 1947, and served and filed herewith, before the Honorable William C. Mathes in his Courtroom in the Federal Post Office and Court House Building, in the City of Los Angeles, State of California, on Friday, the 11th day of July, 1947, at the hour of 10:00 o'clock A. M., on said date, [32] or as soon thereafter as counsel can be heard.

Dated: Los Angeles, California, June 26th, 1947.

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd. [33]

Received copy of the within Notice of Hearing of Motion to Dismiss, Motion to Dismiss and Stipulation re Supporting Points and Authorities this 26th day of June 1947. David Sokol, Attorney for Plaintiffs.

[Endorsed]: Filed Jun. 27, 1947. Edmund L. Smith,
Clerk. [34]

[Title of District Court and Cause]

DEFENDANT'S RESPONSE TO REQUEST FOR
ADMISSION OF FACTS UNDER RULE 36
OF THE RULES OF CIVIL PROCEDURE

The plaintiffs having duly served upon the defendant under Rule 36 of the Federal Rules of Civil Procedure, Request for Admission of Facts, and the defendant having subsequent thereto filed a Motion to Dismiss the cause upon the ground that the Court now has no jurisdiction of the subject matter of the action, and has not had jurisdiction thereof since the effective date of the Portal-to-Portal Act of 1947, and that the Second Amended Complaint does not state a claim upon which relief can be granted and has not [35] stated such claim since the effective date of said Portal-to-Portal Act, and said Motion being set for hearing on the 11th day of July, 1947, and the time within which the defendant is required to respond to said Request, in the event the Court should deny said Motion, expiring on the 1st day of July, 1947, and the defendant in the event,—which it does not anticipate,—of the Court denying its said Motion to Dismiss, not desiring to admit any Request for Admission except as hereinafter stated in the responses thereto, files this, its Responses to the said several Requests for Admission. In doing so, defendant does not waive, but insists upon its Motion to Dismiss upon each and both of said grounds.

I.

Defendant's Response to the First Requested Admission of Fact:

Defendant cannot admit or deny categorically the requested admission, for the reasons that it embraces con-

clusions of law and factual information as to the activities of consumers which the defendant does not now have. Defendant admits that all of the plaintiffs and interveners at all times involved in the litigation were engaged in work necessary for the distribution of its electrical energy to its customers. Defendant further admits that some of its customers were engaged in the production of goods for interstate commerce, and that some of such customers used the electricity furnished in the production of such goods.

II.

Defendant's Response to the Second Requested Admission of Fact:

Defendant denies the requested admission. In this connection, the defendant admits that electrical energy is transmitted to it from Nevada and that such energy is "stepped down" in voltage [36] at its major transmission substations, and after its voltage has been stepped down or altered, it is mingled with its electrical energy obtained from other sources within the State of California and distributed to defendant's customers throughout California. Defendant denies that any of the plaintiffs or interveners were employed at any of such major transmission substations or in the maintenance or operation of any transmission lines from Nevada thereto.

III.

Defendant's Response to the Third Requested Admission of Fact:

Defendant admits that plaintiffs and intervenors, substation relief operators, were employed by the defendant to relieve substation operators on days off, vacations, and during certain other periods when the substation

operator was absent from the job because of sickness or other personal reasons. The defendant cannot ascertain from the form of the requested admission whether anything further than this is contained or implied in the requested admission. If it is, the defendant denies any such further fact or implication.

IV.

Defendant's Response to the Fourth Requested Admission of Fact:

(1) Defendant denies that such relief operators were required to live at the substation, and admits that when relieving a substation operator and attendant the relief operator was required to live in the quarters furnished him by defendant and to remain on or adjacent to the defendant's property during the entire relief period.

(2) Defendant denies that the relief operator was on duty [37] for twenty-four hours a day, and alleges that he would not be on duty except in cases of emergency for more than two to five hours per day.

V.

Defendant's Response to the Fifth Requested Admission of Fact:

Defendant admits the facts requested to be admitted in the fifth requested admission.

VI.

Defendant's Response to the Sixth Requested Admission of Fact:

Defendant denies the facts requested to be admitted by the sixth request for admission.

In this connection, the defendant states:

(1) That the said plaintiffs and intervenors who were substation operators and attendants made out their own

time cards, as alleged in defendant's Answer. That any active duties or services required of them could be performed in from two to five hours a day, and except for certain designated times for calling their switching center and making inspections of the substation, they could perform their services at any time they saw fit, and when not engaged in the active duties required of them, were free to engage in any activities they desired to and which could be performed on defendant's premises. That such plaintiffs and intervenors had no regularly scheduled hours of work; that under the system of payroll accounting applicable to such plaintiffs and intervenors, each made out his own time cards (daily and weekly) from which the monthly time cards of the Company were posted, that such time cards reflected as overtime all call-outs during the night-time hours, as set forth in defendant's answer, which were posted by such employees and for [38] which they were paid at overtime rates of not less than time and a half. Exclusive of such overtime reflected on the time cards, the plaintiffs recorded eight hours for each day worked, notwithstanding the fact that they consumed from only two to five hours per day on the average in active duties during such days. This method of reporting was done with the consent of the defendant and is one of the facts relied on by the defendant in support of its contention that as to such plaintiffs and intervenors as were substation operators and attendants, the defendant and plaintiffs and intervenors regarded their employment as the equivalent of a job of eight hours of active service.

(2) All of the foregoing facts with reference to the substation operators and attendants apply equally to the substation relief operators and to the plaintiffs in defendant's Hydro Division.

VII.

Defendant's Response to the Seventh Requested Admission of Fact:

Defendant denies the facts requested to be admitted in the seventh requested admission.

VIII.

Defendant's Response to the Eighth Requested Admission of Fact:

In answer to the eighth requested admission, the defendant admits that the plaintiffs and intervenors were all paid and compensated for all time worked and for all overtime, as shown by the time cards prepared by the said plaintiffs and intervenors, and further admits that the method of payment and the method of recording time worked is as set forth in the defendant's answer to the Amended Complaint and as set forth in the defendant's answer to the sixth request for admission. The defendant denies that the plain- [39] tiffs and intervenors were not fully compensated for all time in fact worked by them. The defendant cannot ascertain from the form of the requested admission whether anything further is contained or implied in the requested admission; if it is, the defendant denies any such further fact or implication.

Dated: Los Angeles, California, June 30, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant, Southern California
Edison Company, Ltd. [40]

[Verified.]

[Endorsed]: Filed Jun. 30, 1947. Edmund L. Smith,
Clerk. [41]

[Title of District Court and Cause]

STIPULATION

It Is Hereby Stipulated that the Answers to the Request for Admission in the above entitled case are received within the time permitted by the rules, as extended by stipulation of the parties; that in the companion case of Myron E. Glenn, et al., Plaintiffs, vs. Southern California Edison Company, Ltd., a corporation, Defendant, Civil No. 4327 WM, involving precisely the same issues, and in which the plaintiffs requested precisely the same admissions, the parties filed a written stipulation, approved by the Court, extending the time in which the Answers to the Request for Admission could be filed to and including the 1st day of July, 1947, and made and entered into the same agreement in the [42] above entitled case, but by inadvertence did not reduce the same to writing or file the same; that the said Answers filed in the above entitled case are filed within the time agreed to by the parties, as aforesaid, and that the Court may make an order that the Answers be received and filed with the same force and effect as though filed within ten (10) days after the service upon defendant of the said Request for Admission.

Dated: Los Angeles, California, June 27th, 1947.

DAVID SOKOL

Attorney for Plaintiffs

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd.

The foregoing stipulation is approved, and pursuant to the same, It Is Ordered that the said Answers to Request for Admission be received and filed with the same force and effect as though served and filed within ten (10) days after service of the said Request upon the attorneys for the defendant.

Dated: Los Angeles, California, June 30, 1947.

BEN HARRISON

U. S. District Court Judge [43]

Received copy of the within Responses of Defendant to Request for Admission of Facts, and Stipulation this 30th day of June, 1947. David Sokol, by F. A. LaBelle, Attorney for Plaintiffs.

[Endorsed]: Filed Jun. 30, 1947. Edmund L. Smith, Clerk. [44]

[Title of District Court and Cause]

ORDER

The motion of the defendant to dismiss the above entitled action upon the grounds:

(1) That this court has now no jurisdiction of the subject matter of the action, and has not had jurisdiction of the subject matter of the action since the effective date of the Portal-to-Portal Act of 1947, and

(2) That the complaint fails to state a claim upon which relief can be granted and has failed to state such claim since the effective date of the said Portal-to-Portal Act of 1947,

came on regularly to be heard before the Honorable William C. Mathes, Judge Presiding.

Plaintiffs appeared by David Sokol, Esquire, their [45] attorney, and the defendant by Norman S. Sterry, Esquire, and Rollin E. Woodbury, Esquire, its attorneys, and the said motion was duly argued and submitted to the court, and the court being fully advised in the premises, and it appearing that the complaint does not now, and has not since the effective date of the Portal-to-Portal Act of 1947, set forth "a short and plain statement of the grounds upon which the court's jurisdiction depends" as required by Rule 8(a)(1) of the Federal Rules of Civil Procedure, and it further appearing that defendant may now, pursuant to Rule 12(g) of the Federal Rules of Civil Procedure, raise this question by motion to dismiss since the objection and defense was not available to defendant at the time of hearing of defendant's motion heretofore made and determined herein,

Now, Therefore, It Is Ordered:

(1) That defendant's motion to dismiss be and it is hereby granted with leave to plaintiffs to file an amended complaint on or before August 15, 1947, if so advised.

(2) At the request of plaintiffs' counsel, plaintiffs are given leave to file a motion for summary judgment, together with a memorandum of their points and authorities in support thereof and the statement required by local rule 3(d)(2), at any time on or before August 15, 1947.

(3) Counsel for plaintiffs having indicated that he expects to file a motion for summary judgment, and counsel for the defendant that they will probably file a motion with reference to any amended complaint, the court has noted the above cause upon its calendar Monday, Septem-

ber 22, 1947, for the purpose of hearing motions which may be filed by either of the parties, and direct that all motions addressed [46] to the state of the pleadings, or for summary judgment, be noticed for hearing on September 22, 1947, at the hour of 10:00 A. M.

(4) That if, on or before August 15, 1947, the plaintiffs shall file an amended complaint, or any motion for summary judgment, the defendant shall have until and including September 15, 1947, within which to file any motions addressed to the amended complaint, together with defendant's reply by affidavits, pleading, or points and authorities, to any motion of plaintiffs for summary judgment.

(5) That plaintiffs shall have until and including September 20, 1947, within which to file any reply by way of counter-affidavits or points and authorities.

(6) It Is Further Ordered that the order setting this cause for trial on November 11, 1947, be and is hereby vacated, and the cause is now set for trial at 10:00 A. M. on February 3, 1948, with the cause with which it is now consolidated for trial, to wit, Myron E. Glenn, et al., plaintiffs, v. Southern California Edison Company, Ltd., a corporation, defendant, numbered in this court Civil No. 4327-WM.

Done in Open Court July 11, 1947.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed Jul. 25, 1947. Edmund L. Smith, Clerk. [47]

In the District Court of the United States for the
Southern District of California
Central Division

Civil Action No. 5544-WM

RAYMOND F. DRAKE, W. W. BENNETT, F. V.
BRIMMER, HAROLD E. COLLINS, HOWARD
A. McCLOUD, JOHN W. SIMPSON, EARL
FRED SKINNER, CECIL B. JORDAN, C. H.
BOOKER,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON CO., LTD.,
now known as SOUTHERN CALIFORNIA EDI-
SON COMPANY,

Defendant.

AMENDED COMPLAINT UNDER THE FAIR
LABOR STANDARDS ACT OF 1938 AND THE
PORTAL-TO-PORTAL ACT OF 1947

First Cause of Action

Plaintiffs, by way of Amended Complaint, allege as
follows:

I.

Plaintiffs bring this action against defendant under
and by virtue of an Act of Congress of the United States
of America entitled, "The Fair Labor Standards Act of
1938" (Act of June 25, 1939, C. 678, 58 Stat. 1080;
U. S. C., Title 29, Section 201, et seq.), and the Portal-to-
Portal Act of 1947, hereinafter called the Acts. Jurisdic-
tion is conferred upon the Court by said Acts.

II.

The defendant, Southern California Edison Co., [48] Ltd., was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City and County of Los Angeles, State of California. That on May 6, 1947, said defendant, Southern California Edison Co., Ltd., changed its corporate name to Southern California Edison Company. That at all the times herein mentioned, said defendant was and now is engaged in the generation, distribution and sale of electric power. That during all of the times herein mentioned, the defendant distributed and sold electric power within the State of California, which was generated at Boulder Dam, Arizona. Defendant, at all times herein mentioned, distributed, sold and delivered electric power generated by it to railroads, army and navy camps, Western Union and Telegraph Agencies, commercial airports, radio broadcasting stations, newspapers, oil producing companies, motion picture producers, fruit packing plants, and to numerous other industrial concerns which used such electric power for the lighting of their establishments and for the operation of machinery and equipment necessary to the transportation, transmittal, manufacturing, processing and production of goods for interstate commerce.

III.

That the defendant employed the plaintiffs named in the caption of this action in processes and occupations necessary to the generation, distribution and sale of the aforesaid electric power by defendant in interstate commerce, and in processes and occupations necessary to the production, distribution and sale of goods in interstate

commerce by the customers of defendant. That the plaintiffs during the period covered hereby were employed by defendant in the following capacities:

<u>Name</u>	<u>Capacity</u>
Raymond F. Drake	Substation Attendant
W. W. Bennett	Substation Attendant [49]
F. V. Brimmer	Substation Attendant
Harold E. Collins	Substation Attendant
Howard A. McCloud	Substation Attendant
John W. Simpson	Substation Attendant
Earl Fred Skinner	Substation Attendant
Cecil B. Jordan	Substation Attendant
C. H. Booker	Substation Attendant

IV.

That plaintiffs at all times mentioned in this action were employed by defendant under an express provision of an oral and written agreement in effect during all of the time of their employment; that pursuant to said agreement, plaintiffs were employed at a stipulated monthly salary based on 40 hours of work each week and were to receive in addition thereto, additional compensation at one and one-half times their regular hourly rate for all hours worked in excess of forty hours in each work week. That plaintiffs worked in excess of forty hours in each work week during the period covered by this action, but did not receive the compensation required by the Acts, although all of said work time and overtime was compensable under said agreement and said Acts.

V.

That the plaintiff, Howard A. McCloud, was in the military service of the United States between April 8, 1943 to December 14, 1945; that pursuant to Section 205

of the Soldiers and Sailors Civil Relief Act of 1940, the amendments thereto, the period of his military service cannot be included in computing any period of limitation for the bringing of this action.

That the plaintiff, John W. Simpson, was in the military service of the United States between October 16, 1940 to September 24, 1945; that pursuant to Section 205 of the Soldiers & Sailors Civil Relief Act of 1940, and amendments thereto, the [50] period of his military service cannot be included in computing any period of limitation for the bringing of this action.

That the plaintiff, Earl Fred Skinner, was in the military service of the United States between March 20, 1945 and March 25, 1946; that pursuant to Section 205 of the Soldiers & Sailors Civil Relief Act of 1940, and amendments thereto, the period of his military service cannot be included in computing any period of limitation for the bringing of this action.

VI.

That on frequent occasions during three years prior to the filing of this action, since July 10, 1943, in the case of those plaintiffs who are not veterans and for a longer period than three years in the case of the plaintiffs who are veterans, the defendant employed all of the plaintiffs for certain hours in excess of the work weeks established by Section 7 (a), (1), (2), (3) of the Fair Labor Standards Act of 1938; that the defendant failed to pay the compensation for overtime hours in excess of the work weeks prescribed by the provisions of said Section; that the dates of employment, number of hours and amounts of compensation for such overtime for the plaintiffs is a matter reported on the books kept by the defendant; plain-

tiffs have no accurate record of said dates, hours and compensation claimed to be due, owing and unpaid from the defendant to the plaintiffs, and, accordingly, an accounting should be rendered by the defendant to the plaintiffs from the time that plaintiffs were so employed to the date that this action is adjudged, to determine the amount of said claims. That all of the records of said dates, hours and compensation claimed to be due, owing and unpaid from defendant to the plaintiffs are in the possession of the defendant. That there is due and owing and unpaid from the said defendant to the said plaintiffs such compensation for the time during which they and each of them were employed in excess of the work weeks established by said Act in [51] such amounts as shall be determined by said accounting.

VII.

That the plaintiffs are entitled to additional sums equal to the amounts claimed by them, as liquidated damages by virtue of the provisions of Section 16 (b) of the Fair Labor Standards Act; that plaintiffs have employed David Sokol, attorney duly authorized to practice in the above-entitled Court, and by virtue of said Section 16 (b) said attorney is entitled to be awarded a reasonable attorney's fee herein.

And by Way of a Further, Separate and Distinct Cause of Action, Plaintiffs Allege:

I.

Plaintiffs repeat and reallege all of the allegations set forth in paragraphs I, II, III, V, VI and VII of the first cause of action herein as though the same were set forth herein in full.

II.

That by custom and practice in effect at the time of employment of plaintiffs, and at the time that plaintiffs worked overtime as hereinabove set forth, all of said overtime work was compensable.

Wherefore, plaintiffs pray that the defendant be required to account to plaintiffs and each of them for the total number of hours which each has been employed, up to and including the date that this matter shall be determined, in excess of the minimum work weeks prescribed by said Act, and the amount of compensation that is required to be paid by said Acts, and that said sums being computed, a judgment be entered for the plaintiffs and each of them, and against defendants for such amounts as the accounting will show that they are entitled to receive, together with an additional amount as liquidated damages, and a reasonable sum for attorney's fees, costs herein and interest on the amounts due.

DAVID SOKOL

Attorney for the Plaintiffs [52]

[Verified.]

Received copy of the within this 2 day of Sept., 1947.
Norman S. Sterry.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 2, 1947. Edmund L. Smith,
Clerk. [53]

[Title of District Court and Cause]

STIPULATION

It is stipulated by counsel for the respective parties hereto that it may be deemed that the Motion for Partial Summary Judgment filed in Glenn, et al. vs. Southern California Edison Company, entitled Civil No. 4327, was filed also in the above entitled proceeding with the same force and effect as if the Affidavit, Motion and Memorandum in support thereof were filed also in the above entitled action. Plaintiffs adopt said motion, affidavit and memorandum as though the same were set forth herein in full.

It is further stipulated by counsel for the respective parties hereto that any reply or other pleadings filed by the defendant in response to said motion by plaintiffs for partial summary judgment in the Glenn case, shall be deemed to have been made and filed also [54] in the above entitled action without the necessity of defendant actually filing said papers.

Dated: Los Angeles, California, September 2d, 1947.

DAVID SOKOL

Attorney for Plaintiffs

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN E. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd.

It is so ordered this 8 day of September, 1947.

WM. C. MATHES

Judge of United States District Court

[Endorsed]: Filed Sep. 8, 1947. Edmund L. Smith,
Clerk. [55]

[Title of District Court and Cause]

STIPULATION

Whereas, the issues in the above-entitled case are identical with the issues in the case of Glenn, et al. vs. Southern California Edison Company, Ltd., Number 4327-WM, hereinafter referred to as the "Glenn case"; and

Whereas, the above-entitled case has been consolidated for trial with the said Glenn case; and

Whereas, both parties hereto have always made identical motions in both cases and taken identical proceedings:

Now, Therefore, It Is Stipulated, by and between the parties hereto, that whenever the parties hereto stipulate as to any extension of time for either or both of said parties to do or perform any act in said Glenn case, it may be deemed and understood that the [56] same stipulation is made in the above-entitled case, without a formal stipulation to that effect being signed and filed, and that any stipulation hereafter made with respect to the said

Glenn case of any kind or nature shall be deemed to be filed in, apply to, and be made in this case unless the contrary is so provided in said stipulation.

Dated: Los Angeles, California, September 12, 1947.

DAVID SOKOL

Attorney for Plaintiffs

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd.

ORDER

The foregoing stipulation is approved, and it is so ordered.

Dated: September 16, 1947.

WM. C. MATHES

Judge, United States District Court

[Endorsed]: Filed Sep. 16, 1947. Edmund L. Smith,
Clerk. [57]

[Title of District Court and Cause]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant, and for answer to the Amended Complaint on file herein:

Answer to the First Alleged Cause of Action

Specifically answering Paragraph II of the first alleged cause of action in said complaint contained:

I.

(A) Defendant admits that electrical energy generated at Boulder Dam in Arizona was transmitted to certain of defendant's major substations in California, but denies that the electrical energy so received was distributed or sold in the State of California as generated, and in this connection alleges that after it was received, it was passed through the defendant's transformers at its [58] major substations and its voltage reduced or stepped down, and after being so reduced or stepped down it was transmitted into defendant's power lines and commingled with electric energy obtained by defendant from other sources in California, and the commingled electrical energy was sold to defendant's various customers within California. Defendant alleges that none of the plaintiffs performed any service necessary or incident to the receipt of said electrical energy or reducing or stepping down its voltage.

(B) Defendant, basing its answer on its information and belief as to the effect of the facts hereinabove alleged, avers that all of the said sales of electric energy by said defendant were intrastate sales and not interstate sales.

II.

Specifically answering Paragraph III of said first alleged cause of action in said complaint contained:

(A) Defendant admits that it employed each of the said plaintiffs named herein at some time subsequent to July 10, 1943, in the classifications and during the times as follows, and at no other times or periods: [59]

<u>Name</u>	<u>Capacity</u>	<u>Period (All dates inclusive)</u>
Raymond F. Drake	Substation Attendant	8/1/45 to 6/7/46
W. W. Bennett	Substation Attendant	Before 7/10/43 to Present
F. V. Brimmer	Apprentice Substation Operator	1/8/45 to 2/8/45
	Apprentice Operator—Hydro	2/9/45 to 3/15/45
	Substation Attendant and Operator	3/16/45 to 2/28/47 (Utility Man—Territorial—3/1/47 to Present)
Harold E. Collins	Substation Attendant	8/16/43 to Present
Howard A. McCloud	Substation Attendant	Before 7/10/43 to Present
John W. Simpson	Substation Attendant	10/16/45 to Present
Earl Fred Skinner	Substation Attendant	8/26/46 to Present
Cecil B. Jordan	Substation Attendant	10/4/44 to 6/30/45
C. H. Booker	Substation Attendant	5/8/44 to 10/18/46

(B) Defendant alleges that a number of the plaintiffs, during a portion of the time that they were employed as substation attendants or hydro station attendants, as hereinbefore set forth, were employed at three-shift stations, as hereinafter defined.

(C) Defendant denies that any of the said plaintiffs were [60] employed in any occupation necessary to the generation or sale of electrical energy or power in interstate commerce, and in this connection defendant, basing its answer upon its information and belief as to what constitutes intrastate sales, alleges that all, each and every one of its said sales of electrical energy were intrastate. Defendant denies that any of said plaintiffs were engaged in any occupation necessary to the generation, distribution, or sale of electrical energy in interstate commerce, and in this connection alleges that all of said plaintiffs who were substation operators and attendants or substation relief operators and attendants were not engaged in any occupation incident to or connected with the generation of electrical energy, but that their occupation was incident to the distribution of electrical energy by the defendant herein, and that all of the plaintiffs who were employed as hydro station attendants, or hydro station apprentice operators were engaged in occupations incident to the generation of electrical energy, but not connected with or incident to its distribution.

(D) Defendant believes and therefore admits that some of its customers to whom its electrical energy was delivered were engaged in the production of goods for interstate commerce, and that some of such customers used the electricity so furnished in the production of such goods.

III.

Specifically answering Paragraph IV of said first alleged cause of action in said complaint contained:

(A) Defendant admits that each said plaintiff was employed by the defendant in the capacity and during the times heretofore set forth in Paragraph II hereof. Ex-

cept as herein admitted, defendant denies each and every allegation, matter and fact in said Paragraph IV of said complaint contained, generally and specifically.

(B) Further, in connection with the denial of the allegations of Paragraph IV, and in further answer to said Paragraph IV [61] of said first alleged cause of action in said complaint, defendant alleges that each plaintiff was orally employed, and denies that the agreement as to compensation of any said plaintiffs was as in said Paragraph IV alleged. On the contrary, the said defendant alleges that each plaintiff was employed at a monthly salary which was accepted by such plaintiff and was understood and agreed by him to be the full and only compensation for all services to be performed by said employee except for emergency services performed during the night-time hours, as the terms "emergency services" and "night-time hours" are hereinafter defined.

(C) Defendant alleges that at some of its substations and some of its hydro stations it operated what are known as three-shift stations, and that the operators worked a scheduled eight-hour shift; that at the expiration of said eight-hour shift they were free to go anywhere they pleased and to engage in any activity they pleased, and were paid not less than time and a half for any services performed by them either after or before their eight-hour shift.

For brevity of designation, periods between shifts will, as to said operators at three-shift stations, be referred to as "nighttime hours," and as to said operators any active service which they were called on to perform during said nighttime hours as "emergency service." Defendant alleges that there was neither contract, custom, nor practice to pay said operators at three-shift stations anything

other than a monthly salary, and not less than time and a half for emergency services, as hereinbefore defined, performed during nighttime hours.

(D) Defendant alleges that the said plaintiffs described as substation operators and attendants who worked at substations other than three-shift stations, were paid a monthly salary which was substantially in excess of the minimums provided for by the Fair Labor [62] Standards Act; that as aforesaid it was agreed between each of said plaintiffs and the defendant that the said monthly salary should be full payment for normal services of each said plaintiff, whether active or inactive. Defendant further alleges that the normal active services required of substation operators and attendants did not ordinarily require in excess of two to five hours a day, and often not more than two to three hours a day; that due to the nature of the work, except as to certain readings which they were required to make at designated hours at certain stations, and, during the winter months, switching at certain stations to turn on street lights, there were no scheduled hours of work for said substation operators and attendants, each substation operator and attendant being allowed to arrange his own hours of work as he saw fit; that the normal active duties of substation operators and attendants, including the plaintiffs employed in that capacity, could be and were ordinarily performed during the daytime; that during a portion of the time subsequent to July 10, 1943, each substation operator and attendant was required by defendant to live on the property of the defendant for five days each week in a house located near the substation and rented to him by defendant, in order to be able to render necessary service at any time in case of an emergency; that each such resident substation operator had the privilege of having his family live with

him. Defendant is informed and believes, and therefore alleges, that each and all of said substation operators having any family availed themselves of said privilege; that if there were any cases in which a substation operator did not do so, it was because for personal reasons he did not desire to have his family or some particular member of it reside with him. Defendant further alleges that during the time he was not required to perform any active service each such plaintiff could engage in any activity he desired which did not take him beyond such distance from the substation or his residence as to prevent his being able to hear a signal requiring emergency service. Defendant further alleges that because of the nature of the employment, it was understood and agreed between each substation operator and [63] attendant, including each plaintiff employed in that capacity, and the said defendant that, evaluating the employment as a whole, the inactive duties of each said plaintiff and the normal active duties were the equivalent of not more than eight hours of active service. Defendant further alleges that, as hereinbefore alleged, each of said plaintiff substation operators and attendants at all times mentioned herein was paid a monthly salary which, as hereinbefore alleges, was paid and received as compensation for all normal active and inactive services performed by said plaintiffs, but that in order to compensate said substation operators and attendants for extraordinary or emergency active duties, defendant, prior to July 10, 1943, until on or about December 24, 1943, paid to substation operators and attendants, including such of the plaintiffs as were then in its employ in said capacity, not less than time and a half for such active duties as they were called on to perform between the hours of 10:00 P. M. and 8:00 A. M., and from on or about December 24, 1943, paid such compen-

sation for such services performed after 6:00 P. M. and prior to 8:00 A. M., said hours being hereinafter referred to for brevity of designation as to said substation operators and attendants and relief operators and attendants as "nighttime hours," and any active service performed by any of said plaintiffs during said nighttime hours, as hereinbefore defined, as "emergency service." That the accounting department of defendant computed the hourly basis for such overtime compensation in the same manner that it computed the hourly basis for overtime compensation of any other operating employee, that is to say, by multiplying the monthly salary by 12 (the number of months in a year), and dividing the result by 52 (the number of weeks in a year), and dividing the result thus determined by 40. That said method of computing the hourly rate was that used as to all employees of the defendant who were paid a monthly salary and was in accordance with the agreement between each said plaintiff and the defendant as hereinbefore alleged; that considering the employment of each said plaintiff as a whole and [64] the slight amount of active duties required, his employment was the equivalent of not more than eight hours of active service.

(E) Defendant alleges that the duties of the substation relief operators were the same as those of the substation operators and attendants, as alleged in Subparagraph "(D)" hereof, with the exception that such relief operators moved from station to station, normally being at any one station only one to two days, and living in housekeeping quarters provided for such purpose near said station. That the substation relief operators were not normally accompanied by nor did they, normally, live with the members of their families at the stations; but that their duties were, at each station, to relieve the opera-

tor, and during their stay at each station their duties would be the same as those of the regular attendant of the station, and the terms and conditions of their employment were the same as hereinbefore alleged as to substation attendants; that is to say, they were paid a monthly salary which was substantially in excess of the minimums provided by the Fair Labor Standards Act. Said salary was paid to relief operators and attendants semimonthly, and it was agreed between each said relief operator and attendant, including each plaintiff employed in that capacity, and the defendant that such salary should be full compensation for all normal services, active or inactive, performed by each said relief operator and attendant; and it was understood and agreed between each said substation relief operator and attendant, including each plaintiff employed in that capacity, and the said defendant that in evaluating the employment as a whole, the active and inactive duties of each such relief operator were the equivalent of not more than eight hours of active service. That prior to, and at all times since July 10, 1943, the said relief substation operators and attendants were, the same as resident substation operators and attendants, paid not less than time and a half for any emergency service performed by them during the nighttime hours, as the said terms "emergency service" and [65] "nighttime hours" are hereinbefore defined in Subparagraph "(D)" hereof.

(F) That the employment of each plaintiff listed as a hydro station attendant and each hydro station apprentice attendant, other than at a three-shift station, was similar to the employment of substation operators and attendants at substations other than three-shift stations; that is to say, each hydro station attendant and apprentice attendant, including each plaintiff employed in that

capacity, was paid a monthly salary, which was paid semimonthly, and it was agreed between each said hydro station attendant, including each plaintiff employed in that capacity, and the defendant, that said salary should be in full payment for all normal services of each said hydro station attendant, whether active or inactive. That at other than three-shift stations, there were no regular scheduled hours of work, but that their active duties ordinarily would not require eight hours of active work, and that it was agreed between each plaintiff and the defendant that in evaluating his employment as a whole it was the equivalent of not more than eight hours of active service. That during a portion of the time subsequent to July 10, 1943, each said hydro station attendant and apprentice attendant employed in that capacity, including each plaintiff employed in that capacity, was required by the defendant to live on the property of the defendant for five days each week, in a house located near the powerhouse; and during certain days of the week, not exceeding five, and at many stations less than five, when not engaged in any active duty was required to remain so close to the station house or his residence as to be able to hear an alarm bell in case his services were needed in case of an emergency, in order to be able to render necessary services at any time in case of an emergency; that each such resident hydro station attendant and apprentice attendant had the privilege of having his family live with him. Defendant is informed and believes, and therefore alleges, that each and all of said hydro station operators having any family availed themselves of said privilege; that if there were any cases in which a [66] hydro station operator did not do so, it was because for personal reasons he did not desire to have his family or some particular member of it reside with him. Defendant further alleges

that during the time he was not required to perform any active service, each such plaintiff could engage in any activity he pleased which on certain days, as aforesaid, would not take him beyond such distance from his residence and the powerhouse as to prevent him from hearing a signal requiring emergency service.

(G) That at all times mentioned in said amended complaint, each hydro station attendant and apprentice operator has made his own time report. That on such time report there is a space for showing overtime. That prior to and ever since July 10, 1943, each hydro station attendant and apprentice operator (including the plaintiffs employed in said capacities), notwithstanding the fact that his normal active duties would ordinarily be less than eight hours, reported not less than eight hours of work for any day which he reported as working, irrespective whether on that particular day he performed eight hours of active duty or not. That whenever the time reports of any of the hydro station attendants and apprentice operators (including each and all of the plaintiffs employed in such capacities) showed more than forty hours per week, he was paid not less than time and a half for work reported in excess of forty hours for said week; and on and after May, 1943, and at some stations before said date, whenever the time reports of any hydro station attendants or apprentice operators (including each and all of the plaintiffs employed in such capacities) reported more than eight hours of work for any one day, he was paid not less than time and a half for the work reported in excess of eight hours per day, regardless of whether or not his weekly reports showed work in excess of forty hours for that week.

(H) That for the purpose of computing the overtime compensation, the hourly rate was figured in the same

manner as for [67] the said substation operators and attendants as hereinbefore alleged; that said method of computing said hourly rate was that used as to all of its employees who were on a monthly salary, and was in accordance with the agreement between each said plaintiff and the defendant, as hereinbefore alleged; that considering the employment of each plaintiff as a whole, it was the equivalent of not more than eight hours of active service.

(I) Defendant alleges that during the period that the War Manpower Commission decreed a forty-eight-hour week for the industry in Southern California, defendant at various and different times required its operating employees in its several departments to work six days a week instead of five, and that each and all of its said operating employees, including each and all of the plaintiffs who were then in its employ, did work the sixth day without any objection thereto, and without any claim that they were already working more than forty hours per week. Defendant further alleges that for the sixth day, it paid said operating employees, including all of the plaintiffs then in its employ, not less than time and a half for eight hours of work, notwithstanding the fact that, as hereinbefore alleged, normally the active services of each of said plaintiffs on said sixth day would not equal eight hours of active service. Defendant alleges that none of the said plaintiff substation operators and attendants or relief operators and attendants then in its service reported as overtime for the said sixth day more than eight hours of service, except where some one or more of said plaintiffs reported performing emergency service during the nighttime hours, as hereinbefore defined, and that none of the plaintiff hydro station attendants or apprentice attendants reported more than eight hours of overtime service

for the said sixth day, solely because of a requirement not to leave the premises.

(J) Defendant specifically denies that it had any agreement with any of the said plaintiffs as to services or compensation [68] except as hereinbefore alleged, or that it at any time agreed to pay said plaintiffs or any of them for or on account of any activity of the said employees except as herein alleged, and denies that any of the plaintiffs herein, prior to joining in the above-entitled suit, at any time claimed that they were entitled to additional compensation to be paid for by this defendant or gave any indication whatsoever that the employment arrangements as aforesaid did not continue to be mutually acceptable to them.

(K) Defendant alleges that because of the facts hereinbefore alleged, the proper evaluation of the employment of each of its said resident employees, to wit: substation operators and attendants and relief operators and attendants, including each of the plaintiffs employed in that capacity; and hydro station attendants and apprentice attendants, including each of the plaintiffs employed in that capacity, was the equivalent of not more than eight hours of active service, and that the agreement between each of said employees, including each of said plaintiffs herein, as hereinbefore alleged, was a reasonable and proper agreement.

IV.

Specifically answering Paragraph V of said first alleged cause of action in said complaint contained, defendant alleges that its record show that the plaintiff Howard A. McCloud was absent from the service of the defendant from April 8, 1943, to December 12, 1945, inclusive; but defendant has not knowledge, information or belief suffi-

cient to enable it to answer as to whether the said plaintiff actually was in military service during said period or at any time, and on that ground denies that said plaintiff was in military service during said period or any part thereof.

Defendant has no knowledge, information or belief as to whether the plaintiff John W. Simpson was in military service during any part of the period alleged, to wit, October 16, 1940, to [69] September 24, 1945. Defendant alleges that said plaintiff was not in the employ or service of the said defendant on October 16, 1940, and had not been for some time prior thereto; but that after the alleged expiration of his said military service, to wit, on or about the 16th of October, 1945, he entered the service of this defendant.

Defendant has no knowledge, information or belief as to whether the plaintiff Earl Fred Skinner was in military service during any part of the period alleged, to wit, March 20, 1945, to March 25, 1946. Defendant alleges that said plaintiff was not in the employ or service of the said defendant on March 20, 1945; but that after the alleged expiration of his said military service, to wit, on or about the 26th of August, 1946, he entered the service of this defendant.

V.

(A) Specifically answering Paragraph VI of the said first alleged cause of action in said complaint contained, defendant specifically denies that the defendant has employed any of the said plaintiffs herein at any of the times alleged in said paragraph in excess of forty hours per week without paying the said plaintiff at least time and a half therefor.

(B) Further answering said paragraph, defendant admits that it has records showing the hours of work of its various employees, including the plaintiffs, and alleges that such records consist of and are based upon time reports; that the time reports of each plaintiff have been made out and turned in by each said plaintiff, each said time report constituting the representations by each plaintiff making it out as to the time worked by said plaintiff. In this connection the defendant alleges that each and all of its employees of the classes involved in this suit, including each and all of the plaintiffs, made out their own time reports, and that on each time report was a space furnished for overtime. That notwithstanding the facts heretofore alleged, each and all and every employee of the classes involved in this suit, including each and all of the [70] plaintiffs, at all times, that is to say, prior to and after July 10, 1943, to the date hereof, in making out their time reports have customarily reported eight hours of normal duty, irrespective of whether they performed eight hours of active duty, for each and every day which they reported as working; and each and all of the substation operators and attendants and relief operators and attendants, including the plaintiffs employed in that capacity, have reported in the space provided for overtime no overtime except for emergency services performed during the nighttime hours, as said terms have heretofore been defined; that the said hydro station attendants and apprentice attendants, including the plaintiffs employed in such capacity, reported no overtime except where, in unusual emergency cases, they performed more than eight hours of active service per day. During the time that each and all of the said employees of said classes, including the plaintiffs employed in those classes, were required to work six days per week, they reported for the sixth day

eight hours of normal time; and the said substation operators and attendants, and the relief operators and attendants, including the plaintiffs employed in that capacity, made no report for overtime on the sixth day except for emergency service performed during the nighttime hours, as said terms have heretofore been defined; and the said hydro station attendants and apprentice attendants, including the plaintiffs employed in such capacities, reported no overtime for said sixth day except in the event that due to unusual emergency or extraordinary circumstances, they performed actually more than eight hours of active service on said sixth day. Defendant denies that any of its records show that there is any compensation due to the said plaintiffs, or any of them, or any other of its employees, whether for overtime or otherwise, other than current compensation due on the next pay-day. Defendant denies that it employed the said plaintiffs or any of them more than forty hours per week without paying them at least time and a half [71] for the excess time that they were employed beyond forty hours per week. Denies that there is due, owing or unpaid from the defendant to the said plaintiffs, or any of them, compensation for any time for which they were employed in excess of the work-weeks established by said Act, or otherwise. Denies that there is any accounting due, or that any accounting should be required by said defendant to said plaintiffs, or to any other employee.

VI.

(A) Answering Paragraph VII of said first alleged cause of action in said complaint contained, defendant admits that the plaintiffs herein have employed David Sokol herein as their attorney, and that he is an attorney duly authorized to practice in the above-entitled court.

Except as herein admitted, defendants deny the said Paragraph VII and the whole thereof, generally and specifically, and each and every allegation therein contained.

(B) Further answering said Paragraph VII of the first alleged cause of action in said complaint contained, defendant alleges that in not making any payments to the said plaintiffs herein for alleged overtime, it acted at all times in good faith and in a bona fide belief that in paying each said plaintiff the monthly salary agreed upon and the overtime for emergency services as hereinbefore alleged, it was complying with the law and was not violating any statute or contract or custom.

Answer to the Second Alleged Cause of Action

I.

Defendant here adopts, re-alleges, and repeats, with the same force and effect as though fully herein set forth at length, Paragraphs I, II, III, IV, V, and VI of its answer to the said first alleged cause of action. [72]

II.

Said defendant, specifically answering Paragraph II, denies the said paragraph and the whole thereof, generally and specifically.

For a Second, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, defendant alleges:

I.

That as alleged in the first answer to the said first alleged cause of action, each and all of the plaintiffs herein were paid a monthly salary and no other compensation

except the overtime payments as alleged and set out in Paragraph III of the said answer to the first alleged cause of action. Defendant alleges that if the contract of employment were, as alleged by said plaintiffs in Paragraph IV of the said first alleged cause of action, based upon a stipulated monthly salary for forty hours of work per week, there was no contract to pay the said resident employees, that is to say, the plaintiffs employed as substation operators and attendants, and relief operators and attendants, and hydro station attendants and apprentice attendants any additional compensation whatever for being required to remain upon the Company's property or so close thereto as to be able to hear the alarm bell, in case their services were needed for emergency work, nor was there any custom or practice to pay any of the said resident employees, to wit, said plaintiffs employed as substation operators and attendants, relief operators and attendants, hydro station attendants and apprentice attendants, any compensation for their being required to remain, as aforesaid, either upon or so near the Company's property, or at or so near their residences, as to be able to hear an alarm bell, and that such activity on their part was not compensable by either contract or custom or practice at any of the said substations or hydro stations [73] or at all.

For a Third, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, and by way of plea of estoppel:

I.

Defendant here re-adopts, repeats, and re-alleges Paragraph III of its first answer and defense as fully as though here set forth at length.

II.

Defendant alleges that at all times it relied in good faith upon the respective acts and representations and conduct of the plaintiffs as hereinbefore alleged in Paragraph III of its first answer and defense, incorporated herein by reference; that so relying upon their acts and conduct, as hereinbefore stated, defendant believed in good faith that it was paying each and all of the said plaintiffs herein all the compensation which was due them under their contracts of employment and under any applicable laws, and that the employment arrangement continued to be satisfactory and acceptable to the said plaintiffs and that it was not incurring any penalties or liabilities whatever, and defendant based its tax reports to the United States Government and to the State of California upon the belief that it had no contingent or other liabilities, to any of said plaintiffs because of or on account of their employment, or at all.

III.

Defendant alleges that if any of the said plaintiffs herein at any time prior to the institution of said suit had made or advanced the claims they are now asserting for overtime compensation, defendant, notwithstanding its belief that at all times it was complying with the law, would have taken steps to avoid the possibility of incurring further liability if plaintiffs' claims should be sustained, either by placing the various substations and hydro stations upon a [74] three-shift basis as it did as soon as possible after the institution of the Myron E. Glenn, et al., vs. Southern California Edison Company, Ltd., suit, numbered 4327-WM in this court, or by taking such other appropriate steps as might then have seemed advisable to it.

IV.

Defendant alleges that it would be inequitable and unfair to permit the said plaintiffs, or any of them, to now claim or assert that they, or any of them, and the defendant did not agree that, considering the active and inactive duties of each plaintiff, the evaluation of his employment as a whole was not more than the equivalent of eight hours of active service, or that the said agreement was not a reasonable or proper agreement, or one in conformity with the facts and law, and said plaintiffs, or any of them, ought not now to be heard to claim or assert, and all of the plaintiffs are, and each is, estopped to claim or assert that they did not make the said agreement with the defendant as hereinbefore alleged, or that the said agreement was not reasonable and fair, and in conformity with the facts and law.

For a Fourth, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, defendant alleges:

I.

Defendant here adopts, re-alleges, and repeats, with the same force and effect as though fully herein set forth at length, Paragraph III of its first answer to the said first alleged cause of action.

II.

That in the employment of each plaintiff herein in the various occupations as hereinbefore alleged, and under the arrangement and agreements as hereinbefore set out, and in making the monthly payments to each said plaintiff as hereinbefore alleged, plus the [75] overtime for emergency services as hereinbefore defined, and in omitting to make any additional or other payments, the said defend-

ant herein acted in good faith and in the belief that it was fully complying with the provisions both of its contracts and agreements with said employees and with the said Fair Labor Standards Act, and that it acted in conformity with and in reliance upon administrative regulations, orders, rulings, approvals, practices and enforcement policies of the Wage and Hour Administrator, the War Labor Board, and the War Manpower Commission with respect to the class of employers to which defendant belonged.

III.

That in July of 1939, the Wage and Hour Administrator issued Interpretative Bulletin No. 13, said bulletin being revised in October, 1939; in October, 1940; and in November, 1940. That as originally issued and as so revised, the sixth, seventh, and eighth paragraphs thereof read and provided at all times after its promulgation as follows:

“6. In a few occupations periods of inactivity need not be considered as hours worked even though the employee is subject to call. The answer will generally depend upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work—i.e., the frequency with which the employee is called upon to engage in work. In these cases, the nature of the employee’s work involves long periods of inactivity which the employee may use for uninterrupted sleep, to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small

telephone exchange operating a switchboard located in the employee's house. During the night no one is in direct [76] attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the switchboard and is able to get several hours of uninterrupted sleep every night, as experience over a considerable period of time may often demonstrate. Thus, if, over a period of several months, a telephone operator has been called upon to answer only a few calls between the hours of twelve and five in the morning, a segregation of such hours worked will probably be justified.

"7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians or watchmen of lumber camps, during the offseason when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day. In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his meals and has a certain amount of time for relaxation and entirely private pursuits. In some

cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is not working [77] at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in this situation will be accepted by the Division.

"8. In some cases employees may be subject to call after the completion of their regular working day; employees may be called upon after regular working hours to furnish emergency service to customers. If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered hours worked. If, on the other hand, the employee is merely required to leave word where he can be reached in the event of a call and is not tied down to any particular place, such time need not ordinarily be considered hours worked. The employee, however, should be considered as working at any time during which he is actually making a call and his hours worked would include all time traveling to and from such a call."

IV.

(A) That the Pacific Gas and Electric Company maintains and operates a plant for the generation, purchase, sale and distribution of electrical energy in Northern California and as such is an employer of the class to which defendant belonged.

(B) That in generating electricity, it employed hydro station attendants and relief attendants and apprentice operators, and that it maintained substations for the distribution of its electricity and employed and maintained therein substation operators and attendants and relief

operators and attendants. Defendant on its information and belief alleges that the employment and conditions of employment of said hydro station attendants, relief attendants and apprentice operators, and substation operators and attendants and relief operators and attendants was substantially the same as the [78] employment of the same classes of employees by the defendant herein. Defendant, on its information and belief, alleges that each and all of said employees were paid by the said Pacific Gas and Electric Company a monthly salary, which was understood and agreed between said company and each of said employees to be in full for all of the services, active and inactive, performed by said employees. Defendant is further informed and believes, and therefore alleges, that said Pacific Gas and Electric Company pays each of its said employees for certain overtime for emergency active services performed by them similiar to the practice of the defendant as hereinbefore set forth, and that the terms and conditions of work and employment of each class of resident employees of Pacific Gas and Electric Company was substantially the same as the terms and conditions of work and employment of the same class of plaintiff employees of the defendant herein.

(C) Defendant further alleges on its information and belief that the Utility Workers Organization Committee of the C. I. O., for and on behalf of the said employees and many other classes of employees of the said Pacific Gas and Electric Company in 1943 demanded increased wages from the said Pacific Gas and Electric Company, and after negotiating with the said company made application to the National War Labor Board for increases. That the said National War Labor Board appointed a mediation panel to hear evidence and make recommendations thereof. That the report to the said National War

Labor Board by the said mediation panel as to resident employees, which included substation operators and attendants, and hydro station attendants, set up the Union's position and the Company's position as follows:

“(b) Premium Pay for Resident Employees [79]

“The union requested that a premium of 25 per cent be paid to resident employees to compensate them for being available at their place of employment 24 hours a day.

“Union's Position—The union claims that 24 hours per day of a resident employee's time belong to the company; that the union slogan of ‘Eight hours work, eight hours for sleep, eight hours for what you will,’ has no meaning for these employees; that they are as much confined to the premises as inmates of the county prison farm and that, since they are so distinctly at a disadvantage as compared to ordinary employees, they should receive some additional compensation.

“Company's Position—The company maintains that such employees receive compensation for more hours than they actually work and that an additional premium is not justified. Resident employees live at or near the place of employment usually in a dwelling furnished by the company. They perform routine duties which do not require sustained effort. The principal requirement is that the employee be available to necessary telephone calls and to perform switching as directed. They may leave the premises by arranging for a substitute. They do not work under direct supervision. They prepare their own time cards. While not actually engaged in duties for the company they are free to engage in entirely

personal pursuits. They have a five-day week. They are paid for 40 hours per week but under normal conditions never work more than 30. They are compensated at one and one-half times the regular rate of pay for hours worked in excess of 40. Since they receive 40 hours' pay for 30 hours' work, they already have a premium of 30 per cent in actuality. To demand premium payments in such case would be to take undue advantage of the necessity of maintaining 24-hour service [80] for the public. The company claims that the National War Labor Board does not sanction payment for non-work; that the situation of a resident attendant is not one of hardship and such jobs are greatly desired; and that the Wage and Hour Division of the Department of Labor has considered the case of such employees and determined that only the hours spent in work need be compensable."

That the recommendation of said panel was as follows:

"3. Resident Employees

"The panel unanimously recommends that no change be directed in the matter of the wages of resident employees.

We were impressed with the fact that they are now receiving 40 hours' pay for 30 hours' work and time and one half for overtime; that they are their own timekeepers; and that they have considerable free time for their own pursuits.

We recognize that they are more or less limited in their coming and going and that in certain surroundings such limitations can be very irksome.

But balancing the values and the disvalues of the present arrangement we do not believe that undue hardships are involved."

That said report of the panel was made on about the 8th day of July, 1943. That on or about the 28th day of September, 1943, by virtue of and pursuant to the powers vested in it by Executive Order No. 9017 of January 12, 1942, the Executive Orders, directives, and regulations issued October 2, 1942, and the War Labor Disputes Act of June 25, 1943, the National War Labor Board made and issued its order with reference to all the matters in dispute, and in said order adopted the recommendation of the said panel as to resident employees, [81] a portion of said order reading as follows:

"3. The union's request for premium pay for resident employees of the company is denied."

(D) Defendant on its information and belief alleges that since the situation of the resident employees of the said Pacific Gas and Electric Company so far as hours and conditions of work and method of payment was in all respects substantially the same as the hours and conditions of work and method of payment of such plaintiffs herein, this defendant at all times in good faith believed that the said order as to resident employees of the War Labor Board was equally applicable to it and to each and all of such plaintiffs involved herein, and to all other employees performing the said services of such plaintiffs herein, and relied on said order.

V.

That shortly after the effective date of the Fair Labor Standards Act, the Administrator of the Act set up a regional office in Southern California, and, commencing

sometime in 1939 and continuing thereafter, the books and pay-roll records of this defendant were inspected and the Company's compliance was investigated from time to time by representatives of said office, and the said regional office of the Administrator did not at any time inform this defendant that it was in any way violating the Fair Labor Standards Act; but, on the contrary, from time to time the representatives of said Administrator informed defendant that it was operating in strict compliance with the said Act, and on or about the 5th of July, 1941, the said defendant, through its Executive Vice-President, Mr. Mullendore, was publicly advised by the Southern California Manager of the Wage and Hour Division of the United States Department of Labor that defendant was one whose records had been inspected and had been found to be operating in "complete compliance with the Act." [82]

VI.

That at no time since the effective date of the Fair Labor Standards Act has the Administrator or any representative of the Administrator or the War Labor Board, or any other governmental agency, made any complaint that the defendant was in any way violating the said Fair Labor Standards Act in its employment and payment to the plaintiffs herein and other of its employees in the same classes of employment as the said plaintiffs herein.

VII.

Defendant alleges that at all times it relied in good faith upon each and all of the aforesaid actions, rulings, and interpretations of the said administrative agencies of the Government of the United States.

For a Fifth, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, defendant alleges:

I.

That any award of liquidated damages against the defendant as prayed for in said amended complaint will operate to deprive the defendant of its property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States of America.

For a Sixth, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, and by way of plea of the statute of limitations, defendant alleges:

I.

That said action is barred so far as any liquidated damages are concerned under Subdivision 1 of Section 340 of the Code of Civil Procedure of the State of California for any services performed [83] or rendered prior to July 10, 1945, by the plaintiffs Raymond F. Drake, W. W. Bennett, F. V. Brimmer, and Harold E. Collins, or any of them; for any services performed or rendered prior to September 5, 1945, by the plaintiffs Earl Fred Skinner and C. H. Booker, or either of them; for any services performed or rendered prior to November 12, 1945, by the plaintiff Cecil B. Jordan; for any services performed or rendered prior to March 5, 1946, by the plaintiffs Howard A. McCloud and John W. Simpson, or either of them.

For a Seventh, Further, Separate, Distinct Answer and Defense to said complaint and to each and both causes of action therein contained, and by way of plea of the statute of limitations, defendant alleges:

I.

That under Subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California, the action is barred for any services performed or rendered prior to July 10, 1944, by the plaintiffs Raymond F. Drake, W. W. Bennett, F. V. Brimmer, and Harold E. Collins, or any of them; for any services performed or rendered prior to September 5, 1944 by the plaintiffs Earl Fred Skinner and C. H. Booker, or either of them; for any services performed or rendered prior to November 12, 1944, by the plaintiff Cecil B. Jordan; for any services performed or rendered prior to March 5, 1945, by the plaintiffs Howard A. McCloud and John W. Simpson, or either of them.

For an Eighth, Further, Separate, Distinct Answer and Defense to said complaint, and to each and both causes of action therein contained, and by way of plea of the statute of limitations, defendant alleges:

I.

That under Subdivision 1 of Section 338 of the Code of Civil Procedure of the State of California, the action is barred for any [84] services performed or rendered prior to July 10, 1943, by the plaintiffs Raymond F. Drake, W. W. Bennett, F. V. Brimmer, and Harold E.

Collins, or any of them; for any services performed or rendered prior to September 5, 1943, by the plaintiffs Earl Fred Skinner and C. H. Booker, or either of them; for any services performed or rendered prior to November 12, 1943, by the plaintiff Cecil B. Jordan; for any services performed or rendered prior to March 5, 1944, by the plaintiffs Howard A. McCloud and John W. Simpson, or either of them.

Wherefore, defendant prays that plaintiffs take nothing by this action; for its costs of suit herein, and for such other and further relief as to the court may seem just in the premises.

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd. [85]

Received copy of the within Answer this 6 day of
October, 1947. David Sokol, Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 6, 1947. Edmund L. Smith,
Clerk. [86]

[Title of District Court and Cause]

DEMAND FOR JURY TRIAL

Come now the plaintiffs and demand that the above entitled action be set for trial before a jury on the amended complaint and the issues and defenses raised in the answer of defendant to said amended complaint.

DAVID SOKOL

Attorney for Plaintiffs [87]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 7, 1947. Edmund L. Smith, Clerk. [88]

[Title of District Court and Cause]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant Southern California Edison Company, Ltd., and severally moves the court for a summary judgment in favor of the defendant against each several plaintiff upon the ground that on the entire record it appears as a matter of law that the defendant is entitled to a judgment against each several plaintiff and that there is no genuine issue as to any material fact which, if decided in favor of the plaintiffs, or any of them, would entitle the plaintiffs, or any individual plaintiff, to a judgment.

Said motion is made and based upon all the files and records in the above entitled cause and upon all the files and records in the case of Myron E. Glenn, et al. vs. Southern California Edison Company, Ltd., a corpora-

tion, No. 4327-WM (hereinafter referred to as the "Glenn" case), with which the above entitled action [89] has been consolidated for trial, including, but not limited to, the depositions on file in said Glenn case, the affidavits filed therein by plaintiff in support of the motion of certain of the plaintiffs for partial summary judgment, the affidavits filed by the defendant in opposition to said motion, the affidavits filed in said Glenn case in support of the motion of the defendant therein for summary judgment severally against each plaintiff therein, to wit, the affidavits of G. R. Woodman, C. E. Pichler, E. N. Husher, and J. A. Stellern, and upon the points and authorities filed by the defendant in said Glenn case in support of said motion therein for a summary judgment severally against each plaintiff, and the points and authorities filed by said defendant in said Glenn case in opposition to the motion of certain of the plaintiffs for partial summary judgment.

Dated: Los Angeles, California, October 22, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd.

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith,
Clerk. [90]

[Title of District Court and Cause]

MOTION

To: The Plaintiffs in the above entitled action, and to
David Sokol, their attorney:

You, and Each of You, Will Please Take Notice that the defendant's motion for a summary judgment severally against each several plaintiff will be called by the defendant for hearing on Tuesday, the 9th day of December, 1947, at ten o'clock a.m., or as soon thereafter as counsel can be heard.

Dated: Los Angeles, California, October 22nd, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd. [91]

Received copy of the within Notice and Motion for Summary Judgment this 22nd day of October, 1947. Elizabeth Watson for David Sokol, Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith, Clerk. [92]

[Title of District Court and Cause]

INTERROGATORIES PROPOUNDED BY
DEFENDANT TO PLAINTIFFS

To the Plaintiffs in the above entitled action, and to
David Sokol, Esq., their attorney:

Please furnish written answers, under oath, to the
following interrogatories:

Interrogatory No. 1:

From and after March 19, 1942, have any of the plain-
tiffs ever been paid any compensation other than a monthly
salary payable semi-monthly (or weekly salary after
July 1, 1947) and not less than time and a half for all
emergency service reported by them as having been per-
formed during nighttime hours as said [93] terms
emergency service and nighttime hours are defined in the
answer to the amended complaint?

Interrogatory No. 2:

If the foregoing Interrogatory No. 1 is answered in the
affirmative, state the plaintiffs who were paid any such
compensation, the dates and amounts of such payments,
and the services for which they were paid.

Interrogatory No. 3:

From and after March 19, 1942, did all of the plaintiffs
make out their own reports?

Interrogatory No. 4:

If the answer to the foregoing Interrogatory No. 3
is in the negative, state which of said plaintiffs did not
make out their own time reports.

Interrogatory No. 5:

From and after March 19, 1942, did all of the plaintiffs customarily report eight hours of work upon every day on which they reported as working?

Interrogatory No. 6:

If the answer to the foregoing Interrogatory No. 5 is in the negative, state which of said plaintiffs did not customarily report eight hours upon any day upon which he reported as working, the dates when he reported less than eight hours, and the conditions under which he reported less than eight hours for any day worked.

Interrogatory No. 7:

From and after March 19, 1942, did any of the plaintiffs [94] ever report any overtime except for emergency service performed during the nighttime hours, as said terms emergency service and nighttime hours are defined in the answer to the amended complaint?

Interrogatory No. 8:

If the answer to the foregoing Interrogatory No. 7 is in the affirmative, state the character of the overtime reported, the dates and amounts thereof, and the plaintiffs by whom the same was reported.

Interrogatory No. 9:

Other than the filing or joining in of this suit, did any of the plaintiffs ever make any demand upon the defendant for any compensation other than their monthly or weekly salary and overtime for emergency service reported by them as having been performed during the nighttime hours, as said terms emergency service and nighttime hours are defined in the answer to the amended complaint?

Interrogatory No. 10:

If the answer to the foregoing Interrogatory No. 9 is in the affirmative, state fully what demands were made, the plaintiffs by whom they were made, the date or dates of such demand or demands, and to whom they were made; and if the demands were in writing, attach a copy of such writing, if oral, state the substance thereof.

Interrogatory No. 11:

During the time that the Substation Division was operating on six days a week, did not each of the plaintiffs report not less than eight hours of overtime for the said sixth [95] day they worked?

Interrogatory No. 12:

If said Interrogatory No. 11 is answered in the negative as to any of the plaintiffs, state which of said plaintiffs did not report at least eight hours of overtime for said sixth day worked, and the dates and conditions under which he reported less than eight hours of overtime for said sixth day worked.

Interrogatory No. 13:

Did any of the plaintiffs ever report more than eight hours of overtime for the sixth day they worked unless they had performed emergency service during the nighttime hours as the terms emergency service and nighttime hours are defined in the answer to the amended complaint?

Interrogatory No. 14:

If the answer to the foregoing Interrogatory No. 13 is in the affirmative, state the dates and character of the overtime reported and by what plaintiffs.

Interrogatory No. 15:

Did any of the plaintiffs have any contract, written or oral, that they should be paid anything other than their monthly or weekly salary for being required during five days a week (and six days a week when the Substation Division was operating upon a 48-hour week) to remain so near to the substation or their residence as to be able to hear and respond to an alarm bell in case their services were needed?

Interrogatory No. 16:

If the foregoing Interrogatory No. 15 is answered in the [96] affirmative, state what was the nature of the contract, whether written or oral, and if written, attach a copy of it; and if oral, state the substance thereof and when and by whom it was made on behalf of the defendant.

Interrogatory No. 17:

Was there any custom or practice of defendant to pay the plaintiffs or any of them any compensation other than their monthly or weekly salary for being required during five days a week (and six days a week when the Substation Division was operating upon a 48-hour week) to remain so near to the substation or their residence as to be able to hear and respond to an alarm bell in case their services were needed?

Interrogatory No. 18:

If the foregoing Interrogatory No. 17 is answered in the affirmative, state fully of what the custom consisted and of what the practice consisted.

Interrogatory No. 19:

What were the active duties of the plaintiff substation operators and attendants?

Interrogatory No. 20:

Approximately how long each day did it require for the said plaintiffs to perform their active duties?

Interrogatory No. 21:

Was there any time fixed by defendant during the twenty-four hours in which the plaintiffs were to perform their active duties as set out in answer to the foregoing Interrogatory No. 19? [97]

Interrogatory No. 22:

If you answer the foregoing Interrogatory No. 21 in the affirmative, state the hours in which their said active duties were required to be performed.

Interrogatory No. 23:

Did the plaintiffs or any of them understand that they were employed to work a definite scheduled eight hour daily shift?

Interrogatory No. 24:

If the answer to the foregoing Interrogatory No. 23 is in the negative, state upon what basis the said plaintiffs customarily reported eight hours of work for each day on which they reported working and no overtime except for emergency service performed during the nighttime hours, as said terms emergency service and nighttime hours are defined in the answer to the amended complaint.

Interrogatory No. 25:

What did plaintiff understand said "reported eight hours" referred to Interrogatory No. 24, to represent?

Interrogatory No. 26:

If the answer to the foregoing Interrogatory No. 23 is in the affirmative, did the plaintiffs or any of them understand that their monthly or weekly salary which was paid to them was paid only for such eight hour daily shift?

Interrogatory No. 27:

If the answer to the foregoing Interrogatory No. 26 is in the affirmative, list the names of the plaintiffs who understood [98] that their monthly or weekly salary which was paid to them was paid only for such eight hour daily shift.

Interrogatory No. 28:

Did the plaintiffs or any of them understand that their monthly or weekly salary was payment for anything other than their active duties?

Interrogatory No. 29:

If the foregoing Interrogatory No. 28 is answered in the affirmative, state what other services than their active duties they understood were to be compensated for by their monthly or weekly salary.

Interrogatory No. 30:

From and after March 19, 1942, did plaintiffs or any of them receive any compensation other than their monthly

or weekly salary for being required during five days a week (and six days a week when the Substation Division was operating upon a 48-hour week) to remain so near to the substation or their residence as to be able to hear and respond to an alarm bell in case their services were needed?

Interrogatory No. 31:

If the foregoing Interrogatory No. 30 is answered in the affirmative, state which of said plaintiffs received any such compensation, and state of what such compensation consisted and how it was computed.

Interrogatory No. 32:

Was not each of the plaintiffs told when he was employed as or entered upon the duties of a substation operator and attendant [99] or relief operator and attendant that he would be required during five days of the week (and six days a week when the Substation Division was operating on a 48-hour week) to remain so close to the substation or his residence as to be able to hear and respond to the alarm bell in case his services were needed?

Interrogatory No. 33:

If the foregoing Interrogatory No. 32 is answered in the negative, list which of said plaintiffs were not so informed, then state further what said list of plaintiffs were told with regard to the matters set forth in Interrogatory No. 32.

Interrogatory No. 34:

Was not each of the plaintiffs told when he was employed as or entered upon the duties of a substation operator and attendant or relief-operator and attendant that he would receive a specified monthly or weekly salary?

Interrogatory No. 35:

If the foregoing Interrogatory No. 34 is answered in the negative, list which of said plaintiffs were not so informed and state further what said list of plaintiffs were told with regard to the matters set forth in Interrogatory No. 34.

Dated at Los Angeles, California, this 24th day of October, 1947.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for defendant Southern California
Edison Company, Ltd.

[Endorsed]: Filed Oct. 27, 1947. Edmund L. Smith,
Clerk. [100]

[Title of District Court and Cause]

DEFENDANT'S REQUEST FOR ADMISSIONS

To the Plaintiffs in the above entitled action, and to
David Sokol, Esq., their attorney:

Please Take Notice that pursuant to Rule 36 of the Federal Rules of Civil Procedure you are requested to admit within fifteen (15) days after service upon you of this request, for the purposes of this action only and subject to all pertinent objections to admissibility that may be interposed at the trial, the following:

1. That the active duties (other than emergency services reported by them as having been performed during nighttime hours as said terms emergency services and nighttime hours are defined in the answer to the amended complaint) of each of the plaintiffs who are [101] alleged in paragraph III of the first cause of action in the amended complaint to have been employed as substation operators and attendants or relief operators and attendants normally consumed substantially less than eight hours per day.

2. That the contract of employment between defendant and the plaintiffs who are alleged in paragraph III of the first cause of action in the amended complaint to have been employed as substation operators and attendants or relief operators and attendants was as alleged in subparagraphs (D) and (E) respectively of paragraph III of the defendant's answer to the first cause of action in the amended complaint.

3. That the facts alleged in the defendant's fourth affirmative answer and defense to the amended complaint are true.

4. That the Wage and Hour Administrator issued Interpretative Bulletin No. 13 in July of 1939, that the same was revised in October, 1939, October 1940 and November 1940, and that as revised the 6th, 7th and 8th paragraphs thereof have, ever since the said bulletin was issued, read as set out in paragraph III of defendant's fourth affirmative answer and defense to the amended complaint.

5. That the allegations of paragraph IV of defendant's fourth affirmative answer and defense to the amended complaint are true and correct.

6. That the portions of the report of the mediation panel of the National War Labor Board as set out in subparagraph (C) of Paragraph IV of defendant's fourth affirmative answer and defense to the amended complaint is a true and correct statement of said portions of said report.

7. That the third order of the National War Labor Board as set out in subparagraph (C) of paragraph IV of defendant's fourth affirmative answer and defense to the amended complaint as follows: [102]

"3. The union's request for premium pay for resident employees of the company is denied."

is a true and correct statement of said order.

8. That the allegations of paragraph V of defendant's fourth affirmative answer and defense to the amended complaint are true and correct.

9. That the allegations of paragraph VI of defendant's fourth affirmative answer and defense to the amended complaint are true and correct.

10. That the allegations of paragraph VII of defendant's fourth affirmative answer and defense to the amended complaint are true and correct.

11. That on or about July 5, 1941, there was a radio discussion of the Fair Labor Standards Act between Mr. Mullendore, then Executive Vice-President of the defendant, and Mr. Stellern, then Southern California Manager of the Wage and Hour Division of the United States Department of Labor, during which Mr. Stellern stated to Mr. Mullendore that the United States Department of Labor had inspected the records of the defendant Company and had found the Company to be operating in "complete compliance with the Act."

Dated at Los Angeles California, this 28th day of October, 1947.

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd. [103]

Received copy of the within Defendant's Request for Admissions this 28th day of October, 1947. David Sokol, by Elizabeth Watson, Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 29, 1947. Edmund L. Smith,
Clerk [104]

[Title of District Court and Cause]

ANSWER TO DEFENDANT'S REQUEST FOR ADMISSIONS

Comes now the plaintiffs and in answer to the request for admissions, allege:

I.

Deny the allegations in paragraphs 1, 2, 3, 8, 9 and 10 of defendant's request for admissions.

II.

Answering paragraph 4 of defendant's request for admissions, admit that paragraphs 6, 7, and 8 of Interpretative Bulletin No. 13 read as set out in Paragraph III of defendant's fourth affirmative defense, except that the last sentence of paragraph 6 of the bulletin should read:

"Thus, if, over a period of several months, a telephone operator has been called upon to answer only a few calls between the hours of [105] twelve and five in the morning, a segregation of such hours from hours worked will probably be justified."

III.

Object to answering paragraphs 5, 6, and 7 of defendant's request for admissions on the ground that the same is incompetent, irrelevant, and immaterial.

IV.

Answering paragraph II of defendant's request for admissions, plaintiffs have no information, knowledge, or belief sufficient to enable them to answer said request and on said ground deny the allegations therein. Further, plaintiffs deny said allegations on the ground that the only records in the office of the Wage and Hour Administrator in Los Angeles reflect the fact that the administrator and the local office in Los Angeles have held that power companies in this area have violated the Fair Labor Standards Act by failure to pay time and a half the regular hourly rate of pay to various employees for hours spent on call for the convenience of the company in excess of forty hours per week, and have held that failure to record and pay for stand-by hours or hours on call put in generally at substations are in violation of the Fair Labor Standards Act of 1938.

DAVID SOKOL

Attorney for Plaintiffs [106]

[Verified.]

[Endorsed]: Filed Nov. 13, 1947. Edmund L. Smith,
Clerk. [107]

[Title of District Court and Cause]

PLAINTIFFS' ANSWERS TO INTERROGATORIES
PROPOUNDED BY DEFENDANT

Come now the plaintiffs and file their answers to the interrogatories propounded by the defendant:

General Answer and Explanation

The specific answers which follow or which have heretofore been filed, are hereby made subject to the following general answer and explanation.

Many of defendant's interrogatories refer to "active duties." What is an active duty will be a question ultimately to be determined by the Court or jury. None of the answers of the plaintiffs to any question in which the words "active duty" are used by the defendant should be construed as admitting or denying that any particular duty is active or inactive. The fact that certain duties may have expressly or impliedly described one duty [108] or another as active, is not to be construed as stating that the other duties are inactive. The duties of all of the plaintiffs included but was not limited to repairs, maintenance, operation, standby and emergencies. One of the duties for which each of the plaintiffs was engaged was to stand by.

All of the plaintiffs received a monthly or weekly salary which the defendant represented to plaintiffs covered all of the duties described including standby time. There was a contract and custom to pay for standby time, except that the defendant considered that standby time was paid by the overall monthly and weekly wage.

All specific answers regarding contract, custom, minimum and overtime, active and inactive duties, must be read subject to the above explanation and general answer.

Specific Answers

(Note: Each answer number corresponds to the interrogatory number propounded by defendant above date October 24, 1947.)

1. No, except that all activities, including standby, were alleged by the defendant to have been paid for by the monthly or weekly salary or wage plus the designated overtime.

2. See answer to 1.

3. The plaintiffs made out their own time cards under the supervision of their superiors who instructed them to put down only eight hours plus the emergency call-outs.

4. —

5. Yes.

6. —

7. No, subject to answer to 3.

8. — [109]

9. No formal demand was made although the plaintiffs continually complained about the failure of the defendant to pay such overtime. All of the plaintiffs were instructed not to turn in any record on their time cards, time sheets or other records, showing the standby time.

10. —

11. Yes, on instructions as in answer to 3.

12. —

13. No, on instructions as in answer to 3.

14. —

15. The contract was both oral and written. The part in writing set forth in Order A36, which was introduced in evidence at the pre-trial and a copy of which is in the position of the defendant. The part which was oral consisted of the actual hiring and custom and practice and representations made by the defendant to the plaintiffs to the effect that all activities, including standby, were paid for by the weekly or monthly salary and that in addition to said weekly and monthly salary plaintiffs were to receive time and a half their regular hourly rate for all overtime in excess of forty hours each work week. Such representations were made at the time of the employment of the plaintiffs and at the time that Order A.36 was issued in 1942 and revised in 1943.

16. See answer to 15.

17. See answer to 15.

18. See answer to 15.

19. See affidavit of substation operators, attendants and relief men (plaintiffs) filed in support of plaintiffs' motion for summary judgment.

20. See answer to 19.

21. See answer to 19. [110]

22. These plaintiffs were required to be on the premises of the defendant twenty-four hours each day. Normally they were in the substation proper from 8:00 A.M. to 5:00 P.M.

23. No, subject to answer to 22.

24. See answers to 22 and 23.

25. There was no understanding concerning this, except that plaintiffs were informed that they were to put down eight hours.

26. No.

27. —

28. The plaintiffs understood that their monthly or weekly salary, plus payment for emergency time, was payment for all duties and activities performed. They were to receive time and a half for all hours in excess of forty in each work week.

29. See answer to 28.

30. No.

31. —

32. Yes.

33. —

34. Yes.

35. —

Dated: January 12, 1948.

DAVID SOKOL and

PACHT, WARNE, ROSS & BERNHARD

By David Sokol

Attorneys for Plaintiffs [111]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 14, 1948. Edmund L. Smith,
Clerk. [112]

[Title of District Court and Cause]

ADDITIONAL ANSWERS TO DEFENDANT'S
REQUEST FOR ADMISSIONS

Plaintiffs, answering defendant's request for admissions,
allege:

I.

Deny the allegations in paragraph 5.

II.

Admit the allegations in paragraph 6.

III.

Admit the allegations in paragraph 7.

Dated: January 12, 1948.

DAVID SOKOL, and
PACHT, WARNE, ROSS & BERNHARD

By David Sokol

Attorneys for Plaintiffs [113]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 14, 1948. Edmund L. Smith,
Clerk. [114]

[Title of District Court and Cause]

NOTICE OF APPLICATION FOR ORDER REQUIR-
ING PLAINTIFFS TO ANSWER INTERROG-
ATORIES

To: The Plaintiffs in the action above entitled, and to
Messrs. Pacht, Warne, Ross & Bernhard, and to
David Sokol, Esquire, their attorneys:

Take Notice that the defendant in the action above
entitled will, on Tuesday, the 3rd day of February, 1948,
at the hour of ten o'clock A.M., on said date, or as soon
thereafter as counsel can be heard, before the Honorable
Wm. C. Mathes in his Courtroom in the Federal Post
Office and Court House Building, in the City of Los
Angeles, State of California, under Rule 37 of the Rules
of Civil Procedure for the District Courts of the United
States, apply to the Court for an order requiring the
plaintiffs to make definite answers to the following inter-
rogatories, upon the ground that each of the following
numbered interrogatories has actually not been [115]
answered by the plaintiffs:

Interrogatories Nos. 17 and 18: The foregoing inter-
rogatories are answered only by saying, "See answer to
15," which said answer to interrogatory 15 does not
answer the said interrogatories Nos. 17 and 18.

Interrogatory No. 21: The said interrogatory is
answered only by saying, "See answer to 19," which said

answer to interrogatory No. 19 does not answer the said interrogatory No. 21.

Dated: Los Angeles, California, January 28, 1948.

GAIL C. LARKIN

E. W. CUNNINGHAM

ROLLIN E. WOODBURY

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California
Edison Company, Ltd.

Service of the within Notice of Application is acknowledged this 28th day of January, 1948.

It Is Stipulated that the notice of said application is given within a reasonable time, and that the same may be heard at the time noted, to wit, February 3, 1948.

PACHT, WARNE, ROSS & BERNHARD
and DAVID SOKOL

By David Sokol

Attorneys for Plaintiffs

Order to Clerk: File.

MATHES, J.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith,
Clerk. [116]

[Title of District Court and Cause]

ORDER ON DEFENDANT'S MOTION RE
INTERROGATORIES

This cause having heretofore come before the court for hearing on defendant's motion, filed January 29, 1948, requiring plaintiffs to answer certain interrogatories, and the matter having been heard and submitted for decision;

It Is Now Ordered that the defendant's said motion be and is hereby denied.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

May 17, 1948.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed May 18, 1948. Edmund L. Smith,
Clerk. [117]

[Title of District Court and Cause]

ORDER ON MOTIONS FOR SUMMARY
JUDGMENT

This cause having heretofore come before the court for hearing on plaintiffs' motion for partial summary judgment, filed September 8, 1947, and defendant's motion for summary judgment, filed October 22, 1947; and it appearing to the court:

(a) that there is no genuine issue as to any material fact involved in determining the right to recovery in this cause;

(b) that as to each plaintiff the action is one to enforce claimed liability for failure of the defendant employer to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended, [29 U.S.C. §§ 201 et seq.] with respect to certain activities engaged in by the plaintiff employees [118] prior to the effective date [May 14, 1947] of the Portal-to-Portal Act of 1947 [Public Law No. 49, chapter 52, 80th Cong., 1st sess.; 29 U.S.C. §§ 260 et seq.];

(c) That the activities in controversy for which overtime compensation is sought were not made compensable by any contract or custom or practice during the portion of the day when such activities were engaged in [See § 2(a)(b), Portal-to-Portal Act of 1947];

(d) that as to each plaintiff the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, as amended, have been fully met by the defendant employer at all times involved herein prior to May 14, 1947, if the non-compensable activities referred to in (b) and (c) above are excluded in computing worktime, as § 2(c) of the Portal-to-Portal Act of 1947 directs [cf. *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Tenn. Coal etc. Co. v. Muscoda Local*, 321 U.S. 590 (1944)];

(e) that since this action as to each plaintiff seeks to enforce liability on account of the failure of the employer to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended, “with respect to an activity which was not compensable under subsections (a) and (b)” of § 2 of the Portal-to-Portal Act of 1947, jurisdiction of this court of the subject-matter of the action is expressly withdrawn by the provisions of § 2(d) of the Portal-to-Portal Act of 1947; and

(f) that defendant is accordingly entitled, as [119] a matter of law, to a judgment dismissing this action as to each plaintiff for lack of jurisdiction of the subject-matter;

It Is Now Ordered:

(1) that the motion of plaintiffs for partial summary judgment, filed September 8, 1947, be and is hereby denied;

(2) that defendant's motion for summary judgment, filed October 22, 1947, be and is hereby granted; and

(3) counsel for defendant are directed to submit judgment dismissing this action as to each plaintiff for lack of jurisdiction of the subject-matter—and findings of fact and conclusions of law if so advised [See Rule 52(a) F.R.C.P., as amended March 19, 1948]—pursuant to local rule 7 within 10 days.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

May 18, 1948.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed May 18, 1948. Edmund L. Smith, Clerk. [120]

In the District Court of the United States
Southern District of California
Central Division

Civil Action No. 5544 WM

RAYMOND F. DRAKE, et al.,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD., a corporation,

Defendant.

JUDGMENT OF DISMISSAL

Plaintiffs having moved for partial summary judgment, and the defendant having moved for summary judgment against all of the said plaintiffs, the said motions came on regularly for hearing before the Honorable Wm. C. Mathes, Judge, on Tuesday, the 3rd day of February, 1948, at the hour of 10:00 o'clock A.M. Plaintiffs appeared by David Sokol, Esquire, and by Bernard Reich, Esquire, of the firm of Pacht, Warne, Ross & Bernhard, their attorneys; the defendant appeared by Norman S. Sterry, Esquire, of the firm of Gibson, Dunn & Crutcher, and Rollin E. Woodbury, Esquire, its attorneys. Said respective motions of the parties were presented to the Court upon the entire record in the case, including all affidavits and all documents received in evidence on pre-trial hearings, and said motions were argued at length by the respective counsel, counsel for plain- [121] tiff contending, among other grounds, that the Portal-to-Portal Act of 1947 was unconstitutional, and the Court having carefully considered the matter and being fully advised

in the premises, and it appearing and the Court finding from the entire record (1) that there is no genuine issue as to any material fact involved affecting the right of recovery of any of the plaintiffs: (2) that as to each plaintiff the cause of action is prosecuted to enforce recovery for an alleged failure of defendant to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended (29 U. S. C. Secs. 201, et seq.) for certain activities alleged to have been engaged in by each plaintiff employee prior to May 14, 1947, the effective date of the Portal-to-Portal Act of 1947, which activities were made non-compensable by subsections (a) and (b) of Sec. 2 of the Portal-to-Portal Act of 1947, unless there was an express provision of a contract to pay for such activities or they were paid for by custom or practice; (3) that the said activities for which overtime compensation is sought by each of the said plaintiffs were not made compensable by any contract or custom or practice within the purview of subsections (a) and (b) of Section 2 of the Portal-to-Portal Act of 1947; and (4) that as to each plaintiff the minimum wage requirements of the Fair Labor Standards Act of 1938 have been fully met at all times involved herein, and that the defendant has at all times complied with all overtime requirements of the Fair Labor Standards Act if the activities for which each plaintiff sues and which are expressly rendered non-compensable by subsections (a) and (b) of Section 2 of the Portal-to-Portal Act of 1947 are excluded pursuant to the provisions of subsection (c) of Section 2 of the Portal-to-Portal Act of 1947; and the Court having concluded that the Portal-to-Portal Act of 1947 is constitutional and having further concluded from the facts found by the Court as above recited that the defendant's motion

for a summary judgment herein should be granted, except that, as the record shows without controversy as [122] hereinbefore set forth, the action seeks to impose a liability upon the defendant employer as to each plaintiff for alleged activities performed by each said plaintiff prior to May 14, 1947, which said activities were not nor were any of them compensable within the purview of subsections (a) and (b) of Section 2 of the Portal-to-Portal Act of 1947, and hence, under subsection (d) of said Section 2 of the Portal-to-Portal Act of 1947, the court is without jurisdiction of the subject matter of said action;

Now, Therefore, by Virtue of the Premises and the Law, It Is Ordered, Adjudged and Decreed that this action be, and the same is, hereby dismissed as to each and all of the plaintiffs for lack of jurisdiction of the Court of the subject matter of the said action.

Dated: June 8, 1948.

WM. C. MATHES

Judge of the United States District Court

Approved as to form: David Sokol; Pacht, Warne, Ross & Bernhard, by Bernard Reich, Attorneys for Plaintiffs.

Judgment entered Jun. 8, 1948. Docketed Jun. 8, 1948, C. O. Book 51, page 182. Edmund L. Smith, Clerk, by John A. Childress, Deputy.

[Endorsed]: Filed Jun. 8, 1948. Edmund L. Smith, Clerk. [123]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Clerk of the above entitled Court, to the Defendant above named, and to its attorneys, Gibson, Dunn & Crutcher and Gail C. Larkin, Esq., E. W. Cunningham, Esq., and Rollin W. Woodbury, Esq.:

Notice is hereby given that the plaintiffs and each of them in the above entitled action hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment entered in this action on June 8, 1948, in favor of the defendant and against the plaintiffs, and granting defendant's motion for summary judgment and dismissing the action for lack of jurisdiction, and from each and every part of the said judgment.

Dated: June 28, 1948.

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD.

By Bernard Reich

Attorneys for Plaintiffs [124]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 29, 1948. Edmund L. Smith,
Clerk. [125]

[Title of District Court and Cause]

STIPULATION

It Is Stipulated by and between the parties to the above entitled action that the defendant Southern California Edison Company, Ltd. may have to and including the 17th day of August, 1948, to file designation of additional portions of record to be included in the record on appeal in the above entitled action.

Dated: July 29, 1948.

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD

By B. Reich

Attorneys for plaintiffs

GAIL C. LARKIN
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant Southern California Edison Company, Ltd. [130]

It is so ordered.

Dated: Aug. 2, 1948.

WM. C. MATHES
Judge, United States District Court

[Endorsed]: Filed Aug. 2, 1948. Edmund L. Smith,
Clerk. [131]

[Title of District Court and Cause]

STIPULATION EXTENDING PERIOD FOR FILING AND DOCKETING RECORD ON APPEAL PURSUANT TO RULE 73(g) OF THE FEDERAL RULES OF CIVIL PROCEDURE; STIPULATION RE CONSOLIDATION ON APPEAL; ORDER

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto:

1. The time for filing the record on appeal and docketing the action in the Circuit Court of Appeals for the Ninth Circuit is, subject to the approval of the Court, extended to and including September 25th, 1948.

2. The record on appeal in this and the companion case Myron E. Glenn, et al., v. Southern California Edison Company, Ltd., a corporation, Civil Action No. 4327 WM, shall be consolidated on appeal in so far as the Rules of the Circuit Court of Appeals for the Ninth Circuit permit, it being contemplated that the parties will submit a single set of briefs for both cases, and the parties here [132] again reaffirm stipulations made heretofore that all papers, documents, affidavits, depositions and any and all other matters filed in one case shall be considered on appeal with the same force and effect as if filed in the other case.

Dated: July 26th, 1948.

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD

By Bernard Reich

Attorneys for Plaintiffs

NORMAN S. STERRY
GIBSON, DUNN & CRUTCHER and
GAIL C. LARKIN,
E. W. CUNNINGHAM and
ROLLIN W. WOODBURY

By Norman S. Sterry

Attorneys for Defendant

It is so ordered:

Dated August 2, 1948.

WM. C. MATHES

District Judge

[Endorsed]: Filed Aug. 2, 1948. Edmund L. Smith,
Clerk. [133]

[Title of District Court and Cause]

STIPULATION AND ORDER RE DESIGNATION
OF RECORD ON APPEAL AND TRANSMIS-
SION OF ORIGINAL PAPERS

Whereas, the above entitled action was brought to recover for overtime compensation, liquidated damages, and attorneys' fees, and all the issues in the said case both of fact and of law are the same as the issues in the case of Myron E. Glenn, et al., Plaintiffs, v. Southern California Edison Company, Ltd., a corporation, Defendant, Civil No. 4327 WM, hereinafter for brevity referred to as the "Glenn case," except that in the Glenn case, in addition to the classification of employee plaintiffs in the above entitled case, there are other classifications of employee plaintiffs than are involved in the above entitled case, and

Whereas, the above entitled case has at all times been consolidated with the said Glenn case for the purpose of any and all pre-trial hearings set after the filing of the above entitled case, and the hearing of all motions, including the motion of plaintiffs in both of said cases for partial summary judgment, and [130] the motions of the defendant in both said cases for summary judgment in favor of the defendant, which said motions resulted in the order of dismissal in the above entitled case herein appealed from and a similar order in the Glenn case likewise appealed from by said plaintiffs therein, and

Whereas, on the hearing of said motion by the plaintiffs in the above entitled case and the Glenn case for partial summary judgment, and the motion of the defendant in the above entitled case and in said Glenn case for summary

judgment in its favor, the said respective motions were submitted and heard upon all the files and papers in both said cases and a reporter's transcript of the proceedings on said motions and on previous pre-trial hearings was filed in the said Glenn case and not in the above entitled case, and

Whereas, as a matter of precaution the parties hereto have filed in this case identical specifications for the portions of the record to be transmitted to the appellate court, and

Whereas, the specifications by the defendant of the reporter's transcript on the pre-trial hearing on November 18, 1946, and the reporter's transcript on the proceedings on July 11, 1947, and the reporter's transcript of Argument on February 3, 1948, were filed in the said Glenn case and not in this case, and

Whereas, it is the intention of the parties, on the records in both cases being docketed in the United States Circuit Court of Appeals, to arrange, if possible, to have them set and heard together,

Now, Therefore, It Is Stipulated by and between the parties hereto:

1. That in making up the record in the above entitled case to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit the Clerk of the above entitled court need not place in the record in the above entitled case or forward to the Clerk of the said Circuit

Court of Appeals any document speci- [140] fied by either party to be included in the record of the above entitled case that has been included in the record in the said Glenn case, but as to such document the Clerk shall simply insert a paper stating the plaintiff or defendant, as the case may be, has specified the inclusion of the document, briefly describing it, with the notation, "Not included because in the record in the case of Myron E. Glenn, et al., Plaintiffs v. Southern California Edison Company, Ltd., a corporation, Defendant, Civil No. 4327-WM."

2. That any document included in the Glenn case may be considered on the appeal in the above entitled case with the same force and effect as if included in the record in the above entitled court, and that if it is necessary, the parties will, after the docketing of the appeal in the above entitled case, execute and file in the said United States Circuit Court of Appeals for the Ninth Circuit a stipulation to such effect.

3. That no wording of the designation by the plaintiffs of the record to be sent by the above entitled court to the clerk of the Circuit Court of Appeals for the Ninth Circuit shall be deemed a designation of the matter to be printed by the clerk in the United States Circuit Court of Appeals and the parties shall after the record in the above entitled court is docketed in the said Circuit Court of Appeals designate the portions of the record to be printed by the clerk of the said Circuit Court of Appeals within the time provided therefor by the rules of said court.

4. That this stipulation shall be included by the Clerk in the above entitled Court as a part of the record in the above entitled case to be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated: Sept. 2, 1948.

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD

By Bernard Reich

Attorneys for Plaintiffs

GAIL C. LARKIN,
E. W. CUNNINGHAM
ROLLIN E. WOODBURY
GIBSON, DUNN & CRUTCHER

By Norman S. Sterry

Attorneys for Defendant [141]

It is so ordered:

Dated: Sept. 7, 1948.

PAUL J. McCORMICK

District Judge

[Endorsed]: Filed Sep. 7, 1948. Edmund L. Smith,
Clerk. [142]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 142, inclusive, contain full, true and correct copies of Complaint Under Fair Labor Standards Act of 1938; Notice of Motions to Dismiss and to Make the Complaint More Definite and Certain and to Strike Portions of the Complaint; Order Dated November 29, 1946; Answer; Supplemental Answer; Request for Admission of Facts Under Rule 36 of the Federal Rules of Civil Procedure; Motion to Dismiss; Notice of Hearing on Defendant's Motion to Dismiss; Defendant's Response to Request for Admission of Facts Under Rule 36 of the Rules of Civil Procedure; Stipulation and Order re Answers to Request for Admissions; Order re Motion to Dismiss; Amended Complaint Under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947; Stipulation and Order Dated September 8, 1947; Stipulation and Order Dated September 16, 1947; Answer to Amended Complaint; Demand for Jury Trial; Motion for Summary Judgment; Notice of Motion for Summary Judgment; Interrogatories Propounded by Defendant to Plaintiffs; Defendant's Request for Admissions; Answer to Defendant's Request for Admissions; Plaintiffs' Answers to Interrogatories propounded by Defendant; Additional Answers to Defendant's Request for Admissions;

Notice of Application for Order Requiring Plaintiffs to Answer Interrogatories; Order on Defendant's Motion re Interrogatories; Order on Motions for Summary Judgment; Judgment of Dismissal; Notice of Appeal; Statement of Points and Designation of Record; Stipulation and Order re Appellee's Designation; Stipulation and Order Extending Time to Docket Appeal; Defendant's Designation of Additional Portions of Record and Stipulation and Order re Designation of Record on Appeal and Transmission of Original Papers which, together with the reporter's transcripts, exhibits, depositions and other documents certified as a portion of the record in the case of Myron E. Glenn, et al. vs. Southern California Edison Company, Ltd., No. 4327-WM-Civil which are also applicable in this case, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$35.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21 day of October, A.D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

In the District Court of the United States in and for the
Southern District of California
Central Division.

Honorable William C. Mathes, Judge Presiding.

No. 5544-WM-Civil

RAYMOND F. DRAKE, W. W. BENNETT, F. V.
BRIMMER, HAROLD E. COLLINS, and other em-
ployees similarly situated,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD., a corporation,

Defendant.

Consolidated for trial with:

No. 4327-WM-Civil

MYRON E. GLENN, et al.,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD., a corporation,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
ON PRE-TRIAL

Los Angeles, California,

Monday, November 18, 1946.

Appearances:

For the Plaintiffs: David Sokol, Esq.

For the Defendant: Norman S. Sterry, Esq., Rollin E.
Woodbury, Esq.

Los Angeles, California, Monday, November 18, 1946

10:00 A. M.

(Following the disposition of various motions, not transcribed, the following proceedings were had on pre-trial hearing):

Mr. Sterry: Mr. Lyon, will you take the stand, please?

ROBERT LYON,

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Robert Lyon.

The Clerk—L-y-o-n?

The Witness: That is right.

Direct Examination

By Mr. Sterry:

Mr. Sterry: Mr. Reporter, I think that we will want a copy of the testimony that is taken here.

Mr. Sokol: And the plaintiffs, as well.

The Court: Gentlemen, that raises a question which I ordinarily raise at the outset of pre-trial hearings, and that is whether the parties stipulate that the record made upon the pre-trial hearing may be deemed a part of the record upon the trial. [4*]

Mr. Sokol: So stipulated.

Mr. Sterry: I will so stipulate, if it is not so as a matter of law.

The Court: I had assumed that probably it would be as a matter of law.

(Testimony of Robert Lyon)

Mr. Sterry: Well, whether it is or not, we stipulate that this may be deemed a part of the record hearing and be treated with the same force and effect as though given at the trial. And I will say this, if your Honor please: That we will expect to have available at the trial all these men who made these schedules, for further statement, but it is a long time off. Suppose some of them should die, we might be hard put to it to make a foundation.

The Court: The clerk here has a form of a stipulation which he might pass to you gentlemen with respect to the record.

Q. By Mr. Sterry: Mr. Lyon, you are employed by the defendant, Southern California Edison Company?

A. Yes; I am.

Q. And in what capacity?

A. At the present time I am a substation operator.

Q. How long have you been such, Mr. Lyon?

A. How long have I been in that classification?

Q. Yes.

A. I have been in substations about three and one-half [5] years, a little more than three and one-half.

Q. You have operated a number of substations, one-man substations, and also at the two-men substations?

A. That is right.

Mr. Sterry: Mr. Sokol, you will not make any claim that there is any basis for any claim of overtime at the three-men stations, will you?

Mr. Sokol: I prefer withholding any stipulation.

Mr. Sterry: Well, all right.

Q. In any event, Mr. Lyon, you worked at both one and two-men substations? A. That is right.

(Testimony of Robert Lyon)

Q. And quite a number of them?

A. Yes. Only one two-man substation, however.

Q. Mr. Lyon, at the request of your superiors, and that coming from the law department, you made a summary of the logs of various employees, did you not?

A. That is right.

Q. Of substation operators, some of whom were at two-men stations and some at one?

A. That is right.

Q. You had nothing to do with the selection of the logs that you made? A. No; I did not.

Q. After you made them, after you made your first [6] batch, you made some further ones? A. Yes.

Q. But you were not present at any conference between Mr. Sokol, here representing the plaintiffs, and ourselves? A. No.

Q. You only know, then, by hearsay that he requested certain others and the counsel for the defendant asked for certain others? A. That is right.

Q. Or, rather, not counsel—the substation operators, the head of that department, selected others for you to make? A. Yes.

Q. Is that correct? A. Yes.

Mr. Sterry: I now, Mr. Sokol, will give you a list of all those that have been made.

Q. Have you checked this list against those you made?

A. I do not believe that particular one; no.

Mr. Sterry: That has been checked by someone else. I am told, if your Honor please, that this is a list of the logs made, showing the times; and I will offer it into evidence with the logs merely for the purposes of convenience of court and counsel.

(Testimony of Robert Lyon)

The Court: You offer the list?

Mr. Sterry: I am going to offer the logs as soon as— [7]

Mr. Sokol: No objection to the list going in.

The Court: The list will be received into evidence as Defendant's Exhibit—is this our first exhibit?

The Clerk: Yes, your Honor.

Mr. Sterry: This is your first exhibit.

The Court: Defendant's Exhibit A.

Q. By Mr. Sterry: Now, Mr. Lyon, will you take Mr. Andersen's just as a sample and explain to the court how you made that break-down and the classification? In other words, I want his Honor to know just how you prepared that. Maybe you had better show it to his Honor. Have we got a copy there?

A. Yes. These forms were previously prepared, the information requested. I took the log records and got this information from them, compiled it. I also used the record of "time worked" from the time sheets that the men fill out themselves. These are two sections, two separate sections. This material is the log section and this is the time sheet section. I have over here—

The Court: The log section is to the left?

The Witness: That is right.

The Court: To the left of what?

The Witness: This line ends here, this lower line ends, and then the new one begins over here for a new heading.

The Court: There are two parts, then, the part under- [8] neath the long line over which is written "Log Record" is one part?

The Witness: Yes.

(Testimony of Robert Lyon)

The Court: And the part to the right over the portion headed "Record Of Time From Time Reports" and "Remarks" is another part?

The Witness: That is right. And this "Remarks" column at the very extreme right hand may apply to either the log record or the time sheets as they follow through on the same day.

Mr. Sterry: Yes. Go ahead.

A. In preparing these sheets, of course, I got the "Location" and the "Date", the date that the material was taken from out of the log.

Now, the next heading, "Inspected Station (No. of Times)", I looked down through all the entries on that day and found out how many times he said in the log that he had inspected the station, in the body of the log.

"Reported to Switching Center (No. of Times)", I used the same method, and also got that—arrived at the decision as to whether or not he had reported to the switching center by noting that the switching center operator's name was posted in the log opposite Andersen's name, showing that he had okayed in on the telephone. Those did not just apply to home calls, incidentally; they referred to all calls to the switching [9] center, all reports.

"Put Street Lights on (Time)": And this gives the time of day that they were put on. He has none in the station at that particular station.

"Switching Elapsed Time": I show two types of figures broken down in hour or more entries. The "E" indicates my own estimate of time over and above the starred time. The starred time is time which is indicated directly by log entries showing definite starting and stopping time

(Testimony of Robert Lyon)

of switching. And, for instance, this 3 hours and 13 minutes can be a composite of several starting and stopping times blocked together.

The Court: What does that mean, "Switching"?

The Witness: "Switching" is the work that is done in the substation to clear a piece of apparatus for work, or a line for work, or emergency switching to preserve the continuity of the flow of power to the consumers.

The Court: It is station work, is it?

The Witness: Yes.

The Court: Inside the station?

The Witness: That is right.

Now, in these other smaller figures, since they are under an hour, they may or may not be either entirely estimated time or entirely actual time, as shown by records, or a combination of both, but they were not broken down since they were under [10] 1 hour.

"Additional Log Entries": If anything was not covered in these other entries, I showed how many additional log entries he had made that day other than these covered in these other columns, and the time of the first entry in the morning and the last entry in the afternoon or evening.

The Court: That completes your recapitulation of the "log record"?

The Witness: Of the log, yes. Now, on the time sheets I took the same day.

The Court: Does this workman make both the log record and the time sheet?

The Witness: Yes; he signs his name. Anything he did not sign his name to I did not take as factual, because

(Testimony of Robert Lyon)

I did not know whether that was his writing or not. But the standard policy is always to sign your name after anything you put in the log.

The Court: As to these recapitulations you have made, you have taken this information from the log record prepared by the employee affected and from the time reports?

The Witness: That is right.

The Court: Prepared by him, also?

The Witness: That is right.

Mr. Sterry: May I interrupt, if your Honor please?

The Court: Yes. [11]

Mr. Sterry: To say that by understanding is that each one of these employees, all the employees, turn in a daily time report and then a weekly time card.

The Court: And kept a log in addition thereto?

Mr. Sterry: Well, the log is kept by the fellow running the substation. Now, when you say "keep a log," that would apply only to substation men. It does not apply to a lot other of these plaintiffs.

The Court: There is only one log kept, I take it, at each station, and there might be 3 or 4 or a dozen employees at the station?

Mr. Sterry: Yes; that is correct.

The Court: And they would all be making entries in this log?

The Witness: That is right.

Shall I continue with this? Under "Description Labor Operations" it shows "Regular day off" in the man's own writing, because he filled these slips out, and from his regular days off, whether or not he was operating, and

(Testimony of Robert Lyon)

sometimes they showed, if they had any unusual work, they showed what that was, also, because it had to be distributed to different accounts. Incidentally, in this "Description of Labor Operations", in some cases, I standardized on my own initiative to clarify the thing. For instance, some man would show a day off to indicate whether or not he was taking [12] that day off on his own time or whether it was a regular day off. I showed that it was a regular day off unless otherwise shown.

That is about the only place where I had to show a definite wording to distinguish his own from the other.

The Court: If he took a day off regularly how did you note that?

The Witness: As "regular day off", and if it was "day off" on his own time, I distinguished "day off—own time", I believe, as I recall. That happened, I don't believe, more than 2 or 3 times in the whole.

The Court: You mean taking time off on their own time?

The Witness: On their own time; yes.

Down at the bottom where it says: "30 Day Mo. 7 Days off" and the monthly rate, etc., that is taken directly from the monthly time sheet which is a recap of the daily or weekly time sheets. That is this little block at the bottom here, this block here (Indicating to the court.).

The Court: That is as far as the time concerned is taken?

The Witness: That is right.

The Court: The monthly rate and the payments are taken from some other records?

(Testimony of Robert Lyon)

The Witness: Yes. With these time sheets they would run along for 30 days, or whatever the month was, and then [13] there would be a monthly summary following that, which he also made out; and that information there is taken from that monthly time sheet.

Then this other little notation here: "Hours shown for each day worked excluding overtime is 8 hours", that saved our putting another column on the page. These men all put down, as a regular practice, that showed 8 hours on their time slip for the day, and there was no variation from that unless the man got sick and went home and only worked 4 hours, and in those cases that was noted. So, to save a column, this notation is made here.

Aside from that, I can't think of anything else unless somebody wants to ask.

Mr. Sterry: I think that is all. Any questions, Mr. Sokol?

Mr. Sokol: I have a few questions.

Mr. Sterry: Let me just make one explanation, if your Honor please. At the time of trial, I think we will show that originally it averaged the same time about the hours shown; some cards did not show any and some showed others. But I think for the entire period involved a man always showed 8 hours. How much he worked will be a subject of proof, but that was put on there rather than run a column, just as Mr. Lyon stated. Unless he was sick or something, it averaged? That is true, isn't it? [14]

The Witness: Yes, sir.

(Testimony of Robert Lyon)

The Court: These recapitulations are in effect admissions by these employees as far as their records are concerned?

Mr. Sterry: No. The effect of them is a matter that I am not prepared to say at the moment. It is going to be an issue of fact at the trial, and you just could not meet it at the pre-trial hearing. One of the issues of fact will be as to what the actual duties were. You see, the plaintiffs are claiming that, as long as they could not leave the premises, they were on for 16 hours. We claim they were not on any, and that it was tacitly agreed that they had so few active duties that it was equivalent to 8 hours of active duty.

The Court: Out of 24?

Mr. Sterry: Out of 24. Now, that is going to involve not only questions of law but questions of fact on which there will be a great deal of dispute. But the log entries—it is impracticable to bring those logs. If you were caused to bring all the logs, you would not only put the station out by taking their records, but you would have to have a truck-load in here; and we have made this summary so that you could run down here. For instance, a part of this is made to show that, for instance, on a certain day a man made 7 switches and it took so long; another day, another; to give you a sort of composite idea.

There will be a great deal of conflict of testimony as [15] to how much actual time was taken up in actual services. As your Honor developed from Mr. Lyon, a man does anything, he is supposed to put it in the log. If we tried to examine all the logs involved, a month would not even be a starter; and I have asked Mr. Sokol if he would not agree that these were typical; and he says he

(Testimony of Robert Lyon)

does not want to stipulate to anything, but I think, at the proper time, we will try and show that we tried to pick out what would be representative. But it is more to represent the actual time and the actual number of concrete services that they did.

Whether it is an admission or not, without starting, again, arguments of questions of law that your Honor has, but we saved the Statute of Limitations, and I think your Honor will remember that I have said that I do not think you can have an estoppel within the strict sense. But I do think it is the law that where a man keeps his own time and he says to an employer, "I had 6 hours of overtime," that he is estopped to come in later and say that he had 12 hours, because I think the employer has a right to rely on that. To that extent, as to what they did, this may be an admission against their interests, but I am not offering it as an admission of either party, but to give the court and all counsel a sort of an actual reflection, in as brief a way as possible, of what these logs show.

The Court: A summary of the company's records? [16]

Mr. Sterry: Well, it is the company's records and it is the men's records. It is what each showed as their actual services.

Mr. Sokol: May I inquire?

The Court: Had you finished, Mr. Sterry?

Mr. Sterry: Yes.

Cross-Examination

By Mr. Sokol:

Q. Mr. Lyon, going to your last statement there, regularly the men put down 8 hours a day on their weekly time report, is that right? A. That is right.

(Testimony of Robert Lyon)

Q. Incidentally, was "8 hours" printed on the time report, or did they write it in in pencil or otherwise?

A. That was written in several places in pencil.

Q. In pencil? A. Yes.

Q. That was on the time report. Now, in the station proper there is a log book, is that right? A. Yes.

Q. And that is kept in the station?

A. That is right.

Q. Adjoining or somewhere in the vicinity of the station is the home of the employees, is that right? [17]

A. Yes.

Q. The log book is not kept at the home?

A. No.

Q. The hours recorded in the log book are those hours which the first and last entries appear in the log book when he went over to the station? A. Yes.

Q. Although he only put "8 hours" on his weekly time report for his daily work, the log entries do show frequently more than an 8-hour lapse between the first and last entry, is that right? A. Well, they varied.

Q. Well, they speak for themselves.

A. I couldn't say. Yes.

Q. You do not have to answer that, because what you have here shows what the fact is. Perhaps I was not following it too closely. With respect to the columns, which are the ones reflected in the log books, starting with the left here, the name of the Station?

A. The name of the Station.

Q. That is on the log book. And then the "Date": What is that, date of what, date of the log entry?

A. The date of the log entry; yes.

(Testimony of Robert Lyon)

Q. Then that is in the log book. Next, "Inspected Station (No. of Times)," is that in the log book? [18]

A. Yes. In his own writing he says that he inspected the station.

Q. I see. Then, "Reported to Switching Center," is that in the log book?

A. Yes. It is considering that when he switches, standard practice is to call—or other things also—standard practice is to call the switching center, and although it doesn't say in so many words that he called the switching center, the switching center man's name is put in opposite the operator's name, indicating that he did call him.

Q. Yes, I see. Well, that follows. Then I do not have to go through the rest of these. Then, from this column over toward the right where you have the "Date" under "Record of Time From Time Reports"—

A. Yes.

Q. —that is the date that you got from the weekly time report or daily?

A. Daily or weekly. On the weekly.

Q. It appears it was daily here.

A. Well, you couldn't tell from this, because on the weekly time sheets there are blanks, no dates filled in, and the man fills in the date and then puts in underneath that so many hours he worked.

Q. I see. But it was always 8?

A. Well, it was the general practice; yes. [19]

Q. But these "Remarks" over here on the extreme right, for instance, Andersen "(Includes wiping bushings & insulators." Where do you find that?

A. Well, that could have been either in the log or on the time sheet.

(Testimony of Robert Lyon)

Q. You do not recall just now?

A. Well, I couldn't, because this column applies to both. Some of the men were in the habit of entering that information on the time sheets and some were not; but it was picked up from one or the other.

Q. You state that that type of remark would have to be put down for allocation of work time of various towns, or something like that? A. I beg your pardon?

Q. What did you mean by that?

A. Oh, no; various accounts.

Q. Various accounts? A. Yes.

Q. Why would that be necessary?

A. Well, if there are certain minimums of time, if a man spent so much time doing a certain job on a day over a minimum amount of time, he should charge that time to some account which applies, if it is something a little out of ordinary from the daily routine.

Q. Do I understand you, then, that the company's books [20] are kept on that basis, that a man's time is accounted to "production" or "maintenance"; is that what you mean?

A. It can be put in that way if he spends enough time that day to show it; yes.

Q. Now, you did not take every log book of all these plaintiffs; you just took those that are listed in Defendant's Exhibit 1?

The Court: A.

The Witness: Would you say that again?

Mr. Sokol: Will you read it?

Mr. Sterry: I think your question is a little ambiguous. What you mean is—

Mr. Sokol: Well, I will re-word it.

(Testimony of Robert Lyon)

Q. The only log books that you went through are those of the persons named in Exhibit A, Defendant's Exhibit A?

A. Well, I haven't seen this exhibit.

Mr. Sokol: That is correct, isn't it, Mr. Sterry?

Mr. Sterry: That is correct. I will stipulate to that.

Q. By Mr. Sokol: Then, with respect to that, you did not check all of the log books for all of their employment, did you, for the entire period of their employment?

A. Of these men, you mean?

Q. Yes.

A. All the log books for the entire period of their employment? [21]

Q. Yes. A. No.

Mr. Sterry: Only as shown by that.

Mr. Sokol: Only as shown by this.

The Court: Exhibit A shows the dates, shows the period covered, does it not?

Mr. Sterry: Yes.

Q. By Mr. Sokol: You worked in the substations yourself?

A. Yes.

Q. You take in the case of a relief man, is it correct that he goes from one station to another, relieving the employee at that particular station?

A. Usually, yes.

Q. And he remains on the premises 24 hours?

A. The relief man?

Q. Where it was required?

A. Where it was required; yes.

Q. In the case of a relief man you did not check any of those logs; you would have to go through the logs of each and every station?

A. That is right.

Q. Does he make log entries?

A. Oh, yes, yes.

(Testimony of Robert Lyon)

Q. Which classifications of substation employees make [22] log entries? We have the relief men.

A. Well—

Q. Do you have your chief station attendant—does he make log entries?

A. You mean in attendant substations?

Q. That is right.

A. Yes; the operator on shift is generally the man who makes the log entries; and if he is a relief operator, when he gets to a station and takes over, he now becomes the operator.

Mr. Sokol: That is all.

Mr. Sterry: Mr. Sokol, you will stipulate, will you not, that we had a summary of these logs made? After we had them, you met with us in the conference room at the Edison Building; we showed them to you and you asked us to make the summary of logs of certain plaintiffs, which we did, and then we made additional ones ourselves; that is correct?

Mr. Sokol: Yes. The only reason I could not stipulate that these are fair representation is that I do not know. It is rather a vast picture and I would not care to stipulate to something that I am not certain about.

Mr. Sterry: I expect at the proper time to show that, so far as we are able to judge, it is. But if you do not want to stipulate, that is counsel's privilege.

Mr. Sokol: Well, I will investigate it further. [23]

(Testimony of Robert Lyon)

Redirect Examination

By Mr. Sterry:

Q. May I ask this, Mr. Lyon: I think this will make it clearer so the court will understand it. There are in these log entries certain times that you can get definitely, that is where a man indicates that he started switching at 11:00 o'clock and concluded at 1:00; that is a two-hour block; and then there are others where he just says: "Pulled a certain switch," and you have to estimate it from your knowledge of operating as to about how long that would take him, is that correct?

A. That is right. The starred figure is the amount of time which has those definite starting and stopping times; and the figure with the "E" after it, the "E" indicates my estimate of time over and above the time indicated by definite entries.

Mr. Sterry: That is all, Mr. Lyon.

If your Honor please, you asked me a question with reference to these notations of 8 hours, about offering them as an admission of the plaintiffs, and I said, "No." I still say that this was not gotten as an admission of any party, but to show the records. But I do not want to be precluded from the legal effect of anything that they did, any more than Mr. Sokol is by ours. So, in making those, that is one of the factors we rely on.

The Court: Are you offering into evidence now all of the [24] sheets for all purposes?

Mr. Sterry: Now I am offering into evidence all of the sheets of the men listed in Exhibit B (A) for any and all purposes.

The Court: Exhibit A.

Mr. Sterry: As Exhibit A.

The Court: The list is Exhibit A.

Mr. Sterry: The list is Exhibit A. And if I said "B", I mis-spoke myself, as I often do.

I am now offering the "Recapitulation of Station Logs" of various employees, as shown in our Exhibit A.

The Court: Is there objection?

Mr. Sokol: No objection.

The Court: Very well; the documents offered will be received into evidence and will be marked, respectively, Exhibit B on through.

Mr. Sterry: There will be an awful number of them. Let me see and check on that. There are 2, 4, 6, 8, 10, 12, 14, 16, 18—there are 18 of them.

The Court: Mr. Clerk, mark the first one listed, I mean the first set of sheets, the first set of recapitulations just offered, Exhibit B, and the first one that appears on Exhibit A—what is that name?

Mr. Sterry: That is Mr. Andersen, H. L.

The Court: H. L. Andersen. [25]

Mr. Sterry: May I make a suggestion?

The Court: Yes, sir.

Mr. Sterry: That these should be numbered as A-1, -2, -3, etc., Exhibit A-1, A-2, etc.

The Court: Would it not be desirable to sub-number each one of those sheets?

Mr. Sterry: That is what I thought.

The Court: That is the reason I thought it might be advisable to have a different letter, as long as you will have sub-numbers under each letter. Don't you think so?

Mr. Sterry: Yes. Well, just whichever your Honor thinks is better.

The Court: The Andersen set of sheets will be Exhibit B. And may we have that list, Mr. Clerk? The sheets involving H. L. Andersen will be Exhibit B. That consists of 12 sheets and each page will be sub-numbered; the top one will be B-1, to B-12.

The next, H. A. Boynton, will be Exhibit C, and there are 5 sheets and they will be sub-numbered C-1 to C-5.

A. K. Dickerson, those sheets will comprise Exhibit D; there are 4 sheets and they will be sub-numbered accordingly.

The sheets involving M. M. Edgerton will comprise Exhibit E, and there are 13 sheets; those will be sub-numbered accordingly.

The sheets involving E. L. Ellingford will become [26] Exhibit F, and there are 26 sheets which will be sub-numbered accordingly.

The sheets involving C. R. Frazier will comprise Exhibit G; there are 12 sheets and they will be sub-numbered.

The sheets involving P. G. Hanlon will comprise Exhibit H; there are 12 sheets and they will be sub-numbered accordingly.

The sheets involving O. G. Horne will comprise Defendant's Exhibit I, and there are 6 sheets which will be sub-numbered.

The sheets involving W. S. Hostetler will comprise Defendant's Exhibit J, and there are 12 sheets which will be sub-numbered accordingly.

The sheets involving Frank Johnson will be marked Defendant's Exhibit K, and there are 12 sheets which will be sub-numbered accordingly.

The sheets involving H. S. Kaneen will comprise Defendant's Exhibit L, and there are 12 sheets which will be sub-numbered accordingly.

The sheets involving G. F. Larsen will comprise Defendant's Exhibit M, and there are 6 sheets which will be sub-numbered accordingly.

The sheets involving H. E. Mayes will comprise Defendant's Exhibit N; there are 12 sheets which will be sub-numbered accordingly.

The sheets involving B. E. Moses will comprise Defendant's Exhibit O; there are 4 sheets which will be sub-numbered accordingly.

The sheets involving G. W. Stark will comprise Defendant's Exhibit P; there are 36 sheets which will be sub-numbered accordingly.

The sheets involving E. N. Sweitzer will comprise Defendant's Exhibit Q; there are 11 sheets which will be sub-numbered accordingly.

The sheets involving A. Tregoning will comprise defendant's Exhibit R; there are 12 sheets which will be sub-numbered accordingly.

The sheets involving V. V. B. Wert will comprise Defendant's Exhibit S, and there are 6 sheets which will be sub-numbered accordingly.

All are received in evidence.

Mr. Sterry: Mr. Kelly, will you take the stand?

JOHN FRANCIS KELLY, JR.,

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: John Francis Kelly, Jr.

Direct Examination

By Mr. Sterry: [28]

Q. Mr. Kelly, what is your name?

A. John Francis Kelly, Jr.

Q. And where do you live, Mr. Kelly?

A. In Artesia, California.

Q. And you are employed by the defendant, Southern California Edison Company?

A. Yes, sir.

Q. What department are you working for?

A. In the operating department, substation division.

Q. Did you at the direction of your superiors in that department take the time sheets of all of the plaintiffs and interveners in the Glenn case, and later, those in the Drake case and, for the purpose of making a recapitulation or schedule showing what we have denominated "call-out time"?

A. Yes.

Mr. Sterry: I do not want to put these in evidence at this time, the forms have varied, but I am just reserving the right of offering them later, or photostatic copies or samples later. I think counsel is familiar with these.

Q. Will you show the court, just as a sample, what I show of the time cards, the weekly and monthly cards, to show how you make these computations?

A. Your Honor, here are the time sheets. This is a sample of the daily time report. This one is dated March 4, 1942, and shows "operating 8 hours", and is charged to

(Testimony of John Francis Kelly, Jr.)

the [29] proper account. That is at the Station Carpenteria.

The Court: Is that made by the employee?

The Witness: This is made by the individual employee. And this proceeds to an office, a centrally located office, where it is transcribed monthly 100.

The Court: In other words, the individual employee makes out this daily time report which you have shown me?

The Witness: And signs here, your Honor.

The Court: And signs it; and that is sent in to some office where the information appearing on the daily time report is posted onto a monthly time sheet?

The Witness: Yes.

Mr. Sokol: You said "100". Is that Edison Form 100?

The Witness: Yes; that is Edison Form 100.

The Court: Very well. And what is the next step in the process?

The Witness: This time is carefully analyzed as to accounts and hours and description. These, as you will notice, are all "8 hours". That means 8 hours all the time; and his regularly scheduled days off are noted on each sheet. That has to coincide with the free schedule for the entire month for each individual man.

The Court: What is this weekly time sheet that appears here?

The Witness: Now, this weekly time sheet is in respect [30] to the daily, used in the same manner except by the week. In other words, his daily time is entered under a daily date and the number of hours at his normal time rate, plus any overtime for call-outs which he has had is entered on the same sheet.

(Testimony of John Francis Kelly, Jr.)

The Court: Does the same person or the same office that posts the daily to the monthly also post it to the weekly time sheets?

The Witness: Yes. And the men—

Mr. Sokol: I think I had better correct you there. I do not think you are entirely correct. Isn't the weekly gotten up by the employee himself?

Mr. Sterry: That was my understanding.

Mr. Sokol: It is immaterial to me.

The Witness: If there has been a mistake made here, it has been unintentional, I assure you. The weekly is prepared by the employee, and we were discussing the transcription of the weeklies onto the monthlies.

The Court: Probably I misled you there. But the individual employee makes both the daily and the weekly?

The Witness: Yes.

The Court: And the information shown on both of them is posted to the monthly time sheets, the Form 100 which you have identified, is that correct?

The Witness: Yes, sir. [31]

The Court: Posted by someone else in the regular posting?

The Witness: Usually somebody assigned to be a timekeeper, and they are usually initialed by the timekeeper as a matter of record.

Mr. Sokol: Just one question.

The Court: Is the employee paid on this basis?

The Witness: The employee is paid on his monthly and overtime hourly rate.

The Court: Are these records used in computing his pay, too?

The Witness: Yes.

(Testimony of John Francis Kelly, Jr.)

The Court: As part of the payroll records?

The Witness: Yes.

Mr. Sterry: Now, my understanding is, if your Honor please, that during the time involved the monthly time sheet was made during a large part in the field, but not by the employee himself. They are now made, as I understand, in accordance with Mr. Kelly's testimony, in the office now, but part of it, I think, is in the field. I do not think that is material.

The Court: The original entries are daily and weekly?

Mr. Sterry: The original entries from which that is taken, made by him daily and weekly, are made by the man himself and turned in. At the time of the trial I shall want to introduce those. I do not want to introduce them now. They [32] are part of the original accounting records. I simply brought them here for two purposes: To show the court the character of them from which these compilations were made, and to enable counsel to cross examine with reference to that. May I state this, if your Honor please—and I am not stating it as evidence, of course, which is improper for counsel to do, but in explanation: Some depositions have been taken and from them the claim has been made that the sleep was continually interrupted by these numerous call-outs, and the primary purpose, although the sheets will be offered for any and all purposes fully, not limited—the primary purpose was to show the approximate amount of so-called

(Testimony of John Francis Kelly, Jr.)

“call-out time”. Now, “call-out time” does not necessarily mean that of a man’s overtime. For instance, during the period that Southern California was declared to be a critical labor shortage and the Government required 6 days a week, for which he was paid overtime on the basis of 8 hours, that obviously is not “call-out time”.

The Court: You paid him time and a half for Saturday, for the 6th day?

Mr. Sterry: Paid him time and a half for the 6th day, but that is obviously overtime which, if he is entitled to recover, we are entitled to credit for; but it obviously is not “call-out time.”

Also, there were certain regularly scheduled operations [33] which occurred, which was not emergency work, as, for example, where a man, after regular scheduled hours, was required to turn the lights on and take about 5 or 10 minutes, and they were allowed to accumulate that during the week and turn that in; that obviously isn’t “call-out time”.

Mr. Sokol: Well, you see, we differ on that, Mr. Sterry, on some of that.

Mr. Sterry: I don’t think you differ that it is not a call-out. My idea of a call-out is something where a man is called without knowing it. In any event, what I am trying to state to the court, where it was a regular thing that he was expected to do and he was given overtime, that was not attempted to be shown.

(Testimony of John Francis Kelly, Jr.)

Then at certain non-shift stations, there were certain of the stations, they took trouble calls and, of course, that would take a very short space of time, that is one call, maybe a minute or 2 or 3 minutes, and they were allowed to accumulate the calls during the week and put them all in at one time.

That is correct, isn't it, Mr. Kelly?

The Witness: Yes.

Mr. Sokol: No; I don't think that he could testify to that, Mr. Sterry. I would have to object to that, that they accumulated those calls.

Mr. Sterry: No; it was a company practice, Mr. Sokol, [34] to allow a man who was required to respond to telephones, instead of putting them down each day, to accumulate them during the week.

Mr. Sokol: You and I have agreed that the company practice was so diverse, depending upon the division that the man was working in, that whether or not he was allowed overtime for that time is to be determined by the facts. As a matter of fact, that is not correct, Mr. Sterry.

Mr. Sterry: Well, you and I are in disagreement, then, and that will have to be a matter of proof. But, however, we did not.

Q. However, we did not put into this any overtime where it was shown it was an accumulation of telephone calls, is that correct, Mr. Kelly?

(Testimony of John Francis Kelly, Jr.)

The Witness: Would you repeat that question, Mr. Sterry?

Mr. Sterry: Read it to him, Mr. Reporter.

(Question read by the reporter.)

The Court: And by "it" what do you mean, Mr. Sterry? Are you referring to these large sheets?

The Witness: Do you mean the recapitulation there?

The Court: Yes.

Mr. Sterry: Yes. How did you show those?

A. Accumulated time of that nature was so designated as "T" time.

Q. Was "T" time? [35]

A. Those sheets which have foot-notes have accumulated time.

Q. Then at certain non-shift substations the operators on their time reports for special types of switching operations occurring with both seasonal and weekly irregularities were allowed to accumulate. Did you put that on as "call-out time"? A. Yes.

Mr. Sokol: Did you hear the question?

The Witness: I believe I understood it.

Q. By Mr. Sterry: I have here a notation which I understand was furnished you:

"At certain non-shift substations the operators on their time reports for special types of switching op-

(Testimony of John Francis Kelly, Jr.)

erations occurring with both seasonal and weekly irregularity, accumulated their overtime for such operations into a single total figure, but reflected the days on which such operations occurred during the week. The summary reflects the call-out on each day thus designated and the amount of time shown on the summary for each such day represents an average of the total figure accumulated on the employee's time report. All of such time is of course reflected in the column 'Total Hours Call-Out Overtime', and each such call-out as designated on the employee's time report is reflected on the summary." [36]

Is that correct? A. Yes.

The Court: Will you be able to complete this morning, Mr. Sterry?

Mr. Sterry: I do not think so, if your Honor please.

The Court: Would you like to resume, gentlemen, at 1:30?

Mr. Sokol: At 1:30? I would prefer that. I have to leave the city this afternoon.

Mr. Sterry: I can be here at 1:30.

The Court: Very well; let us take a recess at this time. You may step down, Mr. Kelly. Court will recess at this time until 1:30.

(Whereupon a recess was taken until 1:30 o'clock of the same day, Monday, November 18, 1946.) [37]

Los Angeles, California, Monday, November 18, 1946.
1:30 P. M.

Mr. Sterry: Mr. Kelly, will you resume the stand?

JOHN FRANCIS KELLY, JR. (Recalled).

Direct Examination (Resumed).

Mr. Sterry: If your Honor please, I think I got into a little difficulty by trying to short-cut these various exceptions. When these schedules I am about to introduce were made up, trying to show the call-out time—and again, that is my personal idea—“call-out time” is to show some time where the man has been called out to perform some service beyond what might be called the normal working time. I think we designated it in the answer as the “night time” which, I think, is all right where you use the phrase as a designation. Perhaps it is not a happy one, because it does involve some daytime hours; and also, in as far-flung a system as this there will probably be different schedules for normal working hours.

But however that may be, it is not a thing to show the overtime, but what I would denominate was “call-out times.” In order to do that there was made up and transmitted to Mr. Sokol 4 exceptions. I can either read them into the record or show them to the witness and ask him if they are [38] correct, and have it marked as a summary.

Mr. Sokol: That is agreeable to me.

The Court: Why not show it to the witness?

Mr. Sterry: All right. Mr. Kelly, will you read that?

Mr. Sokol: You are going to offer that as explaining just what these schedules reflect?

Mr. Sterry: Yes.

(Testimony of John Francis Kelly, Jr.)

Mr. Sokol: Well, why not offer it?

Mr. Sterry: I will, but I want the witness to say that it is correct. He is the man that did the work.

The Witness: Yes; I have read it.

Q. Is that correct? A. Yes.

Mr. Sterry: Then we will offer this into evidence as explanatory of the schedules about to be introduced. And that would be what exhibit?

The Court: It will be received into evidence as Defendant's Exhibit T, is it not, Mr. Clerk?

The Clerk: Yes, your Honor.

The Court: Do you wish that copied into the record at this point?

Mr. Sterry: I don't think it is necessary.

Mr. Sokol: No. I have a copy of it.

Mr. Sterry: Your Honor might read it so as to just understand, although I think I have indicated generally. That is [39] my copy.

Mr. Sokol: Since you have offered it, I should have asked to take the witness on voir dire before it was received. Would you mind if I should question the witness on that now?

Mr. Sterry: Not at all. Go ahead.

The Court: No. I assumed you had no objection, from your statement.

Mr. Sokol: I just want to see.

Mr. Sterry: I assumed that, because I brought some facts from the witness and Mr. Sokol suggested I offer it. But I have no objection to him asking about it now.

The Court: Why don't you wait and take him on cross examination?

Mr. Sokol: That is all right.

(Testimony of John Francis Kelly, Jr.)

Q. By Mr. Sterry: Now, Mr. Kelly, I think I have asked you this: You made a break-down—or not a break-down—you made a summary or a schedule from the time cards of each one of the plaintiffs—and by “plaintiffs” I include the interveners, too, in both this and in the Drake case—showing the call-out times, as explained by this last exhibit? A. Yes.

Q. In the call-out times, then, you include all the overtime shown on every time sheet, except as explained in this last exhibit? A. Yes, sir. [40]

Q. And some of that call-out time might possibly fall into some of those exceptions, but you would have no way of knowing it; you just included it as “call-out time”, is that correct? A. Yes; that is true.

Q. I think there was one other exception that you also made, and I do not believe it is reflected there, and that is, the company paid overtime for traveling time, did it not?

A. Yes; it did.

Q. And you did not reflect any travel time in these schedule? A. No.

Q. Do those schedules that I have shown you—you can go through them—do they represent all of the call-out times, as you have testified, as shown by the time cards of the plaintiffs in the Glenn suit?

A. In the Glenn suit.

Q. Plaintiffs and interveners?

A. I believe they are substantially correct. Yes; they are.

Mr. Sterry: I think we are going to have some alphabetical trouble, if your Honor please, in numbering and marking all of these. We now offer these all into evidence.

(Testimony of John Francis Kelly, Jr.)

The Court: Are they different individuals?

Mr. Sterry: Oh, yes. [41]

Mr. Sokol: One for each.

Mr. Sterry: These comprise every plaintiff—and by the word “plaintiff” I include the interveners in the Glenn suit and all in the Drake suit—I would not say that; there may have been some interveners since.

Mr. Sokol: Your Honor, you see, as far as the log records are concerned they only put in a sample of those; but as far as these particular schedules are concerned, I understand they have one for each plaintiff and intervener.

Mr. Sterry: And intervener.

The Court: Very well. Are they arranged in alphabetical order?

Mr. Sterry: I do not think so, your Honor.

The Clerk: Yes; they are.

Mr. Woodbury: Yes; they are.

The Court: Any objection to receiving them into evidence?

Mr. Sokol: No. I will object on the ground that the schedules are immaterial. I would like to say this, your Honor: It seems that the basis for offering these schedules into evidence is that there is an attempt to show by this evidence that the sleep of the plaintiffs and interveners could not have been disturbed very much, if at all, because of the fact that the call-out times in certain, if not all, of the cases was infrequent. It is my position, your Honor, that the question of whether or not the sleep was disturbed is not a [42] factor in the determination of this matter; the sole criterion for determination is whether or not the defendant corporation had control of the time spent.

(Testimony of John Francis Kelly, Jr.)

The Court: It is a matter of argument, isn't it?

Mr. Sokol: Yes.

The Court: I take it that these schedules would be material as part of the circumstances. Conceivably a man might be called out every hour. I suppose that would be fairly disturbing, and that might bring one result: whereas, if he received a call sporadically, received calls only occasionally that might bring another result. In either event we would have to know the circumstances, wouldn't we?

The schedules will be received into evidence and will be marked, commencing with Defendant's Exhibit U through to Z, and then commencing with AA, AB, AC and so on. How many are there, Mr. Sterry?

Mr. Woodbury: 49, I believe.

Mr. Sterry: There are 49, they say, in the present case.

The Court: If you will hand them to the clerk, and we will identify them in the record.

Mr. Sterry: You had better put a pencil mark on that as the Glenn case.

Mr. Sokol: I should correct the record. There is one for each of the substation plaintiffs and the hydros.

Mr. Sterry: There are not many for the primary service [43] men, because they are in a category entirely different, and I do not think would be subject to that.

The Court: The schedule for H. L. Andersen will be Exhibit U; for A. G. Austin will be Exhibit V; for C. C. Blenis, will be Exhibit W; for H. A. Boynton, will be Exhibit X; for W. B. Burton will be Exhibit Y. There are two sheets on the W. B. Burton; they will be Exhibit Y-1 and Exhibit Y-2?

(Testimony of John Francis Kelly, Jr.)

E. K. Dickerson, the sheet covering him will be Z.

The sheet covering F. E. Downs will be Exhibit AA.

The sheets covering M. M. Edgerton will be AB-1 and AB-2; there are two sheets.

E. L. Ellingford, two sheets, they will be Exhibit AC-1 and AC-2.

A. E. Fontaine will be Exhibit AD.

C. E. Foster will be Exhibit AE.

C. R. Frazier, two sheets, will be Exhibits AF-1 and AF-2.

M. E. Glenn will be Exhibit AG.

R. C. Green will be Exhibits AH-1 and AH-2.

R. C. Griener will be Exhibit AI-1 and AI-2.

L. G. Hagerman will be Exhibit AJ.

P. G. Hanlon will be Exhibits AK-1 and AK-2.

L. W. Hennig will be Exhibit AL.

J. A. Henle will be Exhibit AM.

W. E. Hogg will be Exhibit AN.

O. G. Horne will be Exhibits AO-1 and AO-2. [44]

W. S. Hostetler will be Exhibits AT-1 and AT-2.

L. F. Hudson will be Exhibit AQ.

L. E. Jackson will be Exhibit AR-1 and AR-2.

Frank Johnson will be Exhibits AS-1 and AS-2.

H. S. Kaneen will be Exhibit AT.

H. J. Krekeler will be Exhibit AU.

S. F. LaFond will be Exhibits AV-1 and AV-2.

George Frank Larsen will be Exhibits AW-1 and AW-2.

P. L. Lowery will be Exhibit AX.

B. E. Moses will be Exhibits AY-1 and AY-2.

E. M. Kirste will be Exhibits AZ-1 and AZ-2.

(Testimony of John Francis Kelly, Jr.)

H. E. Mayes will be Exhibits BA-1 and BA-2.

F. E. McClanahan will be Exhibits BB-1 and BB-2.

J. W. McKernan will be Exhibits BC-1 and BC-2.

L. S. Morgan will be Exhibits BD-1 and BD-2.

C. S. Myrenius will be Exhibit BE.

A. L. Neff will be Exhibits BF-1 and BF-2.

V. Neher will be Exhibit BG.

T. E. Osborne will be Exhibit BH.

M. S. Poston will be Exhibit BI.

J. W. Rodenbeck will be Exhibits BJ-1 and BJ-2.

J. C. Schrader will be Exhibits BK-1 and BK-2.

F. D. Schwalbe will be Exhibits BL-1 and BL-2.

G. W. Stark will be Exhibits BM-1 and BM-2.

(No exhibit was marked with the designation "BN".) [45]

E. N. Sweitzer will be Exhibits BO-1 and BO-2.

A. Tregoning will be Exhibits BP-1 and BP-2.

H. A. Trunnell will be Exhibits BQ.

V. V. B. Wert will be Exhibits BR-1 and BR-2.

Q. By Mr. Sterry: I now show you further schedules on that and ask you if those are the plaintiffs and interveners in the Drake case that were prepared by you?

A. Yes; they are.

Mr. Sterry: And we offer these into evidence. Wait a minute.

Q. They were prepared in the same way?

A. In the same manner; yes, sir.

Q. To show exactly the same thing as the others?

A. The same, identical.

Mr. Sterry: We offer these, then, into evidence.

(Testimony of John Francis Kelly, Jr.)

The Court: Is the last exhibit number "BR", Mr. Clerk?

The Clerk: Yes, your Honor.

The Court: Is there objection?

Mr. Sokol: The same objection.

The Court: The objection is overruled. These documents will be received into evidence and will be marked Defendant's Exhibits as follows:

The sheets covering W. W. Bennett will be Exhibits BS-1 and BS-2.

The sheet covering F. V. Brimmer will be BT. [46]

The sheets covering H. E. Collins will be Exhibits BU-1 and BU-2.

The sheet covering R. F. Drake will be Exhibit BV.

Mr. Sterry: Now, if your Honor please, my impression is—I have not checked—my impression is that there have been one or two interveners in the Drake case since these schedules were made up. And your Honor made an order this morning in effect permitting interventions in the Drake case up to and including the first of April, if I remember. And we want to reserve the right, of course, to make schedules for each one of those as they come in. As we make them, I will send copies to counsel and expect to offer similar ones at the trial.

I do not think there is any need of taking up the court's time for any further pre-trial, because they will be exactly the same.

There is one thing I do want to ask of counsel before I proceed in this matter. I have indicated, I think, an en-

(Testimony of John Francis Kelly, Jr.)

tire desire to assist counsel as far as I can. I know Mr. Sokol wants to assist me in making it as expeditious as possible. I do not believe it is possible—well, anything is “possible”—but I do not believe it is feasible to try to make digests of all of the log books. As a matter of fact I doubt if physically it could be done between now and the time of trial. We have tried to make those which we think are representative, and are prepared and will be prepared at the trial to offer [47] evidence on them.

Now, counsel stated a little while ago that he would give it further consideration. And I want to ask him now, in open court, to try to let me know whether or not, within a reasonably short period, he wants others—he has already asked, I think for three or four—if he wants others to be included. If he will let us know, but not right at the eve of trial, we will be very glad to have them made. But, as your Honor can well imagine, there are not many men qualified to make it. First, it has to be a man who has some unusual intelligence and a man who is familiar with that kind of work; and Mr. Lyon, who was here, impressed me very favorably and I think he is about the only one available. He is actually working, and it takes time to get him off and arrange for somebody else to be there; and it takes tremendous time for him to go through, because he has not only to go through the logs, but he has to then take the time sheets and balance them. I don't know anything more about him than your Honor does, but from what I have talked with him, he impresses me as being tremendously conscientious in it; and I do not think you can hurry it, because I do not think he would intentionally want to make a mistake either way.

(Testimony of John Francis Kelly, Jr.)

So I would ask counsel now—the case is set for the 25th, I think, of February—I would ask him to advise me by the middle of January whether there are any more he wants; and [48] if not, whether he will stipulate that those are fairly representative. I do not say that they are actually representative. I doubt if you could get anything, because there are slight variations.

Mr. Sokol: I will do my very best in that regard. What I will do, I will get the best men on those substations that I know of to go over all of them and state to me whether or not they think they are representative.

The Court: As to any additional ones you may wish, Mr. Sokol—

Mr. Sokol: By January 15th?

The Court: Can't we get a reasonable deadline now?

Mr. Sokol: January 15th is agreeable with me.

Mr. Sterry: I think that I should know not later than January 15th, because, as your Honor can understand, it does take a tremendous amount of time.

The Court: It is understood, as I understand it now, that you gentlemen agree that, by January 15th, you, Mr. Sokol, will let Mr. Sterry know if you desire any further recapitulations of log books.

Mr. Sokol: That is correct.

The Court: Would that apply to these schedules that were last introduced?

Mr. Sterry: And that was one of the reasons I wanted a deadline on intervention, because I intended to have one of [49] those schedules for every one of these.

If your Honor please, there will be a lot of mathematical calculations on all of those which we did not have

(Testimony of John Francis Kelly, Jr.)

time to make, and we will study and Mr. Sokol can be studying.

For instance, we had computed the number of call-out times to the days of work, etc. Just taking at random Mr. Bennett, who is shown here—he is in the Drake case—during July of '43 he got a call-out, an average of one call-out to 23 days; during the next month, 1 to 21 days; during the next month, none; then the next month, 1 to 24. Then he was 1, 2, 3, 4, 5 months without any call-outs. A lot of them have run many months without it; others, where they are stationed where they have had storms, have had a great many more. But it would be a Herculean task, and it would be a very confusing and difficult task for the court to try and get the balance and go through and summarize all of these. So I intended to have a general balance struck for the whole time. We did not do that because we just did not have time, but I am intending to have similar sheets made of these for every intervener from now on in the Drake case.

Mr. Sokol: Frankly, I do not intend to burden this court with any requests on those log sheets, either, because that would be an unnecessary burden on the court. But I may—right now I do not feel that I am going to request any—but after going over the matter, if there are any requests from [50] any of those people, they will be whittled down considerably.

The Court: Did the clerk hand you back that sheet that you passed up to me?

Mr. Sterry: That was my copy.

The Court: A copy of Exhibit T, your copy of Exhibit T?

(Testimony of John Francis Kelly, Jr.)

Mr. Sterry: Of Exhibit T.

The Court: Is there anything further from Mr. Kelly?

Mr. Sokol: Yes; just a few questions.

Mr. Sterry: Pardon me just a second. I thought I had one question. It could not have been important, I guess.

Q. I think, Mr. Kelly, looking still at this sheet of Mr. Bennett's, that it is indicated in your explanatory statement at the head that this line means where there was one continuous call-out running over from the night of one day into the next, is that correct? A. Yes.

The Court: Which line do you refer to?

Mr. Sterry: (Indicating to the court on Exhibit BS-1.) To that line.

The Court: It would be a line opposite the month "October" on the sheet?

Mr. Sterry: You see, this is of all months.

The Court: The W. W. Bennett sheet 1.

Mr. Sterry: You see, there are two lines, if your Honor please. The one that is straight up and down shows more than [51] one call-out in one day; the other, as I understand—and correct me—as I understand, this shows that where a man has a call-out, say, at 11:00 o'clock to-night and it continues over into tomorrow, it is the same call-out but it is charged to two different days.

Q. Am I correct in that or not, Mr. Kelly?

A. That is right.

The Court: The legend at the top of the sheet explains it.

The Witness: There is a legend that explains that.

The Court: Referring to the schedules.

Mr. Sterry: To the schedules.

(Testimony of John Francis Kelly, Jr.)

The Court: Which have been introduced as Exhibit U to BV, inclusive, covering both the Glenn and the Drake cases.

Mr. Sterry: All right. Pardon me. Go ahead.

Cross-Examination

By Mr. Sokol:

Q. Mr. Kelly, in general, I understand that these last schedules that were introduced in evidence reflect call-out time in this sense: For certain time the Edison Company paid overtime, is that correct?

The Witness: Would you repeat that question again, please?

Mr. Sterry: Let the reporter read it. [52]

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. Yes.

Q. By Mr. Sokol: Now, that overtime did not include the standby time, is that correct, that paid overtime? It merely was the emergency call-out time, is that correct?

Mr. Sterry: Mr. Sokol, I do not want to be technical. On the other hand, I do not want to have an answer to a question in a form that may mislead.

Mr. Sokol: I understand your objection. I will withdraw that question.

The Court: Can we agree upon this.

Mr. Sokol: Yes.

The Court: As I understand from the explanation that has been made, these call-outs cover a period when a man actually did something; it was not while he was waiting to do something?

(Testimony of John Francis Kelly, Jr.)

Mr. Sterry: That is true.

The Court: It was while he was doing something, and usually it was after hours, usually in the night time?

Mr. Sterry: That is what we designated, as I remember, in our Answer as "night time hours." I am willing to stipulate with Mr. Sokol as follows: These men were all paid a monthly salary; they were not in the substations, with exceptions that need not be here mentioned; they were required to remain on the station property during 5 days a week except when we had a real emergency, and then for 6 days a week. [53] Now, after what is denominated, you might say, the normal working hours, the night time hours, whatever you want to call them, if they made a call to go to the station and make a switch or do anything else, they were paid overtime for that.

Mr. Sokol: That is the call-out time.

Mr. Sterry: That is the call-out time.

The Court: It presupposes, as I understand it, the man has done his 8 hours work; he quits at 5:00 o'clock; at 8:30 he may be called upon to do something.

Mr. Sokol: Called down to the substation; if he is called out of his home to go down to the substation; just across the way.

The Court: And these schedules that you have last identified here cover actual call-out, not standby, waiting to be called out; is that correct?

Mr. Sokol: That is the way I understand it.

Mr. Sterry: That is correct.

Mr. Sokol: There is one other—

Mr. Sterry: The question as to whether the company is liable for that so-called standby time, and if so, how

(Testimony of John Francis Kelly, Jr.)

much, is one of the issues in the case which is not intended to be covered by these schedules, except these schedules show the amount of actual times they are called out, which may be a factor in determining that. [54]

The Court: I suppose that when it comes to the argument, that the argument will be made that the experience should be some determining factor in showing whether a man is actually at work when he is subject to call. I mean what he may reasonably expect. It may be the experience that a man might usually expect to be called out every other night; it may be the experience on some stations that he may not reasonably expect a call once in 6 months.

Mr. Sokol: Or just in the stormy period of the year.

Q. I will ask you, Mr. Kelly, suppose a man had telephone calls but he did not get paid for those telephone calls, accumulated telephone calls that he answered; that particular time would not be reflected on these schedules, is that correct? A. Yes.

Q. Do you mean that time would be reflected on the schedules?

A. No; I mean that it would not be reflected on those schedules.

Q. Now, in the event a man, an employee-plaintiff here, turned on street lights but was not paid emergency overtime for that work, that also would not be reflected on these schedules?

Mr. Sterry: Well, now, wait a minute. Again, there might be some technical objection to the form of that question [55] as you put it, that he did not get paid for it. If that was at the time in which the company

(Testimony of John Francis Kelly, Jr.)

did not pay him, and he did not show it on his time card, why, that would be true. If at that time the company did make a habit of paying it and he did not turn it in, did not put it on his time card, he would not get it; but if he put it on his time card and, through some inadvertence, maybe, it is checked out wrong, it would still be reflected. As I understand, Mr. Kelly did not make these up from payroll records, but made it up from the actual time cards as they turned them in.

Mr. Sokol: I will accept that as the answer of the witness.

The Court: Very well.

Q. By Mr. Sokol: What did you use in getting up these schedules, what material?

A. The material consisted of the daily time sheets, the weekly time sheets, and the monthly time sheets.

Q. And what you first looked for was what emergency overtime they got paid for, is that right?

A. That is the first basis we worked on; yes, sir.

Q. When they were on the Manpower Commission order for the 48-hour week, you know, when they were on the 6-day week under the Manpower Commission order—

A. Yes.

Q. —then they got paid 8 hours on the 6 days, didn't [56] they, overtime, 8 hours overtime?

A. Yes.

Q. Did you include that 8 hours in your computation of call-out overtime paid?

A. No.

Q. Nor did you include the standby time—I will call it "standby time"—on that 6 days, that is, the balance of the 24 hours; you did not include that in any call-out time in your schedules?

(Testimony of John Francis Kelly, Jr.)

The Witness: Could you be just a little clearer in that?

Mr. Sokol: I think the court understands it. The same thing applies.

Mr. Sterry: I will stipulate to that.

Mr. Sokol: You stipulate to that.

Mr. Sterry: I will tell you, for your information, that we had many conferences as to what would be called-outs, and it was my instruction that the time cards reflect only those things, as your Honor said, where he was actually called out to do something after normal hours.

Mr. Sokol: I just wanted it clearly understood that that 8 hours under the 6-day Manpower Commission order which was paid as overtime is not reflected as call-out time in these schedules.

Mr. Sterry: That was one of the very things that was shown in this explanation. [57]

The Court: This Exhibit T excludes that?

Q. By Mr. Sokol: What else besides the payment of overtime did you look for in the daily, weekly and monthly time reports in arriving at these schedules?

A. Well, the work descriptions were analyzed also.

Q. For what purpose?

A. For the purpose of determining a call-out.

Q. Will you explain that? Give us one example of that.

A. In a sense of the word, the call-outs, we speak of "call-outs" on those time reports where they were listed in various manners by various people. It is to be assumed that no two persons would make it out alike; so, by carefully analyzing those things beforehand, before this sched-

(Testimony of John Francis Kelly, Jr.)

ule is prepared, I mean that we analyzed the work description, plus the hours of call-outs. Is that clear?

Q. Yes. You could not make a statement with respect to the general time of the day or night when the call-outs occurred, principally?

A. Of a general nature?

Q. Yes. A. No.

Mr. Sokol: That is all.

The Court: In other words, your record would not show whether it was in the daytime or the nighttime? [58]

The Witness: In some respects, your Honor, yes; in some respects, no.

The Court: When you say you analyzed the nature of the work, do you mean by that that you looked at the time sheet to see what the man was doing in order sometimes to determine whether it was call-out work or not?

The Witness: Yes.

The Court: That is all I have.

Mr. Sokol: That is all.

Mr. Sterry: That is all.

The Court: You may step down.

Mr. Sterry: Your Honor, before proceeding with the next witness, my friend, Mr. Woodbury, is afraid that I may not have been quite technical enough in answering some of the questions when I stated that it did not reflect payments of certain time. One of the issues of course, here, and one of the claims of the defendant, is that monthly salary was payment for all time, whether it be regarded as active or inactive duties. But it is difficult, either here or during a trial, to always make statements with reference to a factual situation that embraces all

(Testimony of John Francis Kelly, Jr.)

facts; and I simply want to call that to the court's attention in my explanation.

The Court: As I understand it, defendant contends with respect to these station attendants that their salary contemplated everything that they did? [59]

Mr. Sterry: That is one of the issues involved that your Honor, after hearing all the facts, will have to determine. I did not mean to take that away when I said that these schedules did not intend to show any payments for that time. All I meant to say was that all it was intended to show was simply the call-outs, as we had explained that. I am quite sure your Honor understands it.

The Court: Yes; I understand that to be the defendant's contention throughout.

Gentlemen, I will interrupt at this time to call the 2:00 o'clock calendar.

(Short interruption for other court proceedings.)

Redirect Examination

By Mr. Sterry:

Q. Mr. Kelly, there is just one question that I wanted to ask you. Mr. Kelly, without going through all these schedules that you made up, I know that some of them are for short periods of time, and I will ask you generally: They cover all of the time that a man was working in that particular work, do they not, during the period involved in this suit? A. Yes.

Mr. Sokol: Excuse me. Except that it stops at—

Mr. Sterry: Now you are referring to—

Mr. Sokol: It is not right down to date. The last few [60] months are not included in the schedules.

(Testimony of John Francis Kelly, Jr.)

The Witness: What months are we speaking of?

Mr. Sokol: I think you went down to October.

Mr. Sterry: Oh, yes; you are correct.

Mr. Sokol: October, 1945.

Mr. Sterry: We had a stopping date. We stopped at October.

Q. What closing date did you have?

A. I believe it was October, 1945.

Q. Yes; that is correct. From the time of the applicable period of this suit, it included all the time that he was in there down to that date which we took for a closing date?

A. Yes, sir.

Q. And that work started way last year, did it not? I mean when you first started making these schedules that was more than a year ago, was it not, Mr. Kelly?

A. To be correct, I believe we finished in June, 1946.

Q. Well, you started many months before that, didn't you?

A. I believe over a period of three months, approximately three months.

Mr. Sterry: All right; thank you.

The Court: Then, as I understand it, gentlemen, these schedules which comprise Exhibits U to BV, both inclusive, cover down through October, 1945 and cover the period indicated [61] on each sheet?

Mr. Sterry: On each sheet.

The Court: But that period purports to be the entire period of the employment of the person named?

Mr. Sokol: That is correct.

Mr. Sterry: In that particular department during the applicable period of this lawsuit.

(Testimony of John Francis Kelly, Jr.)

The Court: Now, that would be?

Mr. Sokol: March, 1942, down to date.

The Court: Irrespective of limitations?

Mr. Sokol: The 3-year Statute.

Mr. Sterry: No; you take the 3-year Statute.

Mr. Sokol: Yes; we took the 3-year. That took it back to March, 1942. We filed in March, 1945, so that, by the Statute, it took it back to March, 1942.

The Court: These schedules go back as far as March, 1942?

Mr. Sterry: Wherever the man was employed at that time. You see, there are a lot of them are short. When you come to examine them, a few of them run through almost the entire period and others run through for only a short period of time.

The Court: The period covered by the investigation made in compiling is from March, 1942 through October, 1945, is that correct?

The Witness: —That is right; yes, sir. [62]

Mr. Sterry: And, if your Honor please, you will also note—you probably won't now because you won't study these—that some of the men who are here will also appear in the hydros which we are about to put in, and that is because they have been changed. One man worked for a time in the hydro department and then for a time in substations, and you only find substations.

The Witness: Yes, sir.

Mr. Sterry: That is all, Mr. Kelly.

F. W. BANKS,

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: F. W. Banks.

Direct Examination

By Mr. Sterry:

Q. State your name in full.

A. Francis Webster Banks.

Q. And you live where? A. San Bernardino.

Q. And you are employed by the defendant, Southern California Edison Company? A. I am. [63]

Q. In what department?

A. In the southern division of the hydro generation department.

Q. You say you live in San Bernardino. Where is your place of work? A. In San Bernardino.

Q. The Edison Company office there?

A. In the division office.

Q. You have heard Mr. Kelly's testimony?

A. I have.

Q. And you have been present at several conferences that I referred to in my statement to the court, when we were determining the form for these schedules?

A. Yes.

Q. And I think you are also familiar with the exceptions which are made in that Exhibit T? You have seen that? A. I have.

Q. Did you prepare similar schedules for the men in the hydro department to the ones prepared by Mr. Kelly of the substations? A. Yes.

(Testimony of F. W. Banks)

Q. And that covered the same period of time that he has just testified about? A. Yes; it did.

Q. That was from March, was it, of 1942 down through [64] October of 1945? A. Yes, sir.

Q. I show you a series of schedules and ask you if those are the hydro plaintiffs, including in the word "plaintiffs" interveners in the Glenn case? A. They are.

Q. Are there any men in the hydro division in the Drake case? A. Yes.

Q. How many, if you remember? A. One.

Q. One schedule is in there? A. It is.

Mr. Sterry: Unless there is more detail, I think that is sufficient. I will offer these schedules into evidence.

Mr. Sokol: The same objection, your Honor, as to materiality.

The Court: Objection overruled. The documents are received into evidence and will be marked as follows:

The sheets, two of them, covering G. H. Bartholomew, will be marked Defendant's Exhibits BW-1 and BW-2.

The sheets marked Merle Bartholomew will be marked Defendant's Exhibits BX-1 and BX-2.

The two sheets covering L. H. Bell will be marked Defendant's Exhibits BY-1 and BY-2. [65]

The single sheet covering F. V. Brimmer will be marked Defendant's Exhibit BZ.

The two sheets covering J. J. Bryan will be marked Defendant's Exhibits CA-1 and CA-2.

The two sheets covering E. G. Eggers will be marked Defendant's Exhibits CB-1 and CB-2.

(Testimony of F. W. Banks)

The two sheets covering F. E. Griffes will be marked Defendant's Exhibits CC-1 and CC-2.

The single sheet covering L. G. Hagerman will be marked Defendant's Exhibit CD.

The single sheet covering M. H. Huntington will be marked Defendant's Exhibit CE.

The two sheets covering R. B. Johnson will be marked Exhibits CF-1 and CF-2.

The two sheets covering Fred Ray will be marked Defendant's Exhibits CG-1 and CG-2.

The single sheet covering M.E. Roach will be marked Defendant's Exhibit CH.

The two sheets covering Clarence Rogers will be marked Defendant's Exhibits CI-1 and CI-2.

The single sheet covering G. C. Wooldridge will be marked Defendant's Exhibit CJ.

Mr. Sterry: If your Honor please, there is just one possible mis-statement or it might be misleading. The schedules went back, as stated, to March of 1942, but in the [66] Drake case they only went back 3 years from date that it was filed, to July of 1943, would it not be?

Mr. Woodbury: Yes.

Mr. Sterry: Now, if your Honor please, at the other or last pre-trial order, we announced that neither side were introducing documents, and the pre-trial order required counsel to exhibit to each other all the documents they intended to introduce, except of impeachment; and we filed, pursuant to that order, a stipulation—I can't remember it—in which we listed the documents exhibited

(Testimony of F. W. Banks)

to each other, and included in those documents, in a sort of booklet form, are general orders which I have supplied counsel with a copy of. And we stated in there that each of us desired to reserve the right to introduce anything further at the trial that further study should develop. But my personal opinion is that there isn't anything further. I do not mean by that, that there are not many, many orders, but I think they are probably similar. I do not see the purpose of introducing those right now. They can be agreed to.

But Mr. Sokol has some other and additional documents that he asked me Thursday to get. He asked me to bring up here Thursday some additional documents. I got everything except one, which was not in town and I could not get, and put those in, but I would not want to be precluded from introducing other documents that I saw were called for by those [67] documents. I have not had time to study them or examine them.

The Court: Do you wish these orders referred to?

Mr. Sokol: I desire them put in.

The Court: Marked at this time?

Mr. Sokol: Yes, your Honor. I desire to have them offered into evidence.

The Court: I am referring now to the matters just referred to by Mr. Sterry. I believe they are referred to as Item 6 on page 8 of the pre-trial stipulation.

Mr. Sokol: Yes. I have the orders here.

The Court: Do you have those?

Mr. Sokol: Yes. I want to offer them.

The Court: Very well. Have you anything further, gentlemen, from Mr. Banks?

Mr. Sokol: Nothing.

Mr. Sterry: Now, may both Mr. Banks and Mr. Kelly be excused? Mr. Banks lives in San Bernardino.

Mr. Sokol: No objection.

Mr. Sterry: I don't know whether Mr. Kelly wants to wait and go down or not.

The Court: Mr. Banks and Mr. Kelly are both excused from further attendance.

Mr. Sokol: At this time, your Honor, I would like to offer into evidence "Substation Division Order No. A-36 of [68] the Operating Department Substation Division Revised January 1, 1942," consisting of—

Mr. Woodbury: Isn't that in that book?

Mr. Sokol: Yes. I have taken them out.

Mr. Sterry: Why don't you offer the whole book?

Mr. Sokol: I think that would be a little confusing for the record. This consists of 6 pages, this particular order.

The Court: Is there any objection?

Mr. Sterry: No objection, your Honor.

The Court: The document is received into evidence and will be marked Plaintiff's Exhibit—is it the first exhibit?

Mr. Sokol: No. Didn't I have a "1"?

Mr. Sterry: I do not think you have offered any other.

Mr. Sokol: That will be 1.

Mr. Sterry: I think, so far as any of these orders are concerned, they probably are admissible as such. The effect of them on any of the issues is possibly debatable, but that is not a matter to be discussed here on that. They are our orders, and if any portion should be immaterial, the court can decide that on the merits just as well as it can now.

Mr. Sokol: Is that received, your Honor?

The Court: Yes; and will be marked Plaintiff's Exhibit 1. Is that correct, Mr. Clerk?

The Clerk: I think so. I would like to look at the record. [89]

Mr. Sterry: It is my impression, Mr. Clerk, and I would not want to be bound by it, that nothing was offered at the other pre-trial hearing.

Mr. Sokol: I do not remember.

The Clerk: This will be Plaintiff's Exhibit 1.

Mr. Sokol: I would now like to offer as Plaintiff's Exhibit 2 "Substation Division Order No. A-36", entitled "Operating Department Revised January 1, 1943 Working Conditions and Payment of Wages."

Mr. Sterry: Now, you are not offering just a part; you are offering the whole?

Mr. Sokol: The whole thing, consisting of 6 pages. This is a revision of the first one.

Mr. Sterry: That is all right.

The Court: Exhibit 1 is the A-36 order as revised January 1, 1942?

Mr. Sokol: That is right.

The Court: It comprises 6 pages also?

Mr. Sokol: That is correct. As I understand it, Mr. Sterry, when my Exhibit 2 came out that cancelled Exhibit 1, the first order?

Mr. Woodbury: Superseded it.

Mr. Sterry: Superseded it.

Mr. Sokol: So stipulated.

Mr. Sterry: Now, wait a minute. Mr. Woodbury calls my [70] attention that the one of 1943 was 7 sheets.

Mr. Sokol: Here it is. I am offering that now.

Mr. Sterry: No; that is not the same thing. You offered one, you say, of 6. I will stipulate to the authenticity of anything we furnish you.

Mr. Sokol: Well, you look it over. This had 7 sheets. I am sorry. It is my error.

The Court: Which one is that?

Mr. Sokol: Exhibit 2.

The Court: Exhibit 2 is comprised of 7 sheets?

Mr. Sokol: Yes.

The Court: Exhibit 1 of 6, is that correct?

Mr. Sokol: Yes.

The Court: I think it is well to have the record show these matters and then there can't be any question.

Mr. Sokol: I now offer a one page document as Plaintiff's Exhibit 3, dated April 7, 1943, entitled "Substation Div. Order A-36, Working Conditions and Payment of Wages," and it is signed "C. M. Cavner, Supt. of Substations."

The Court: What is the date of it, please?

Mr. Sokol: Dated April 7, 1943.

The Court: April 7 or 17?

Mr. Sokol: Dated April 7, 1943.

The Clerk: Plaintiff's Exhibit 3.

The Court: Received into evidence. [71]

Mr. Sokol: I now offer as Plaintiff's Exhibit 4 "Hydro Generation Order No. 22," entitled "Operating Department Hydro Generation Division Revised January 1, 1942 Working Conditions and Payment of Wages," and the entire document which consists of—

Mr. Sterry: 6 pages.

Mr. Sokol: 6 pages.

Mr. Sterry: It might be well to state, as Mr. Sokol has read "Working Conditions And Payment Of Wages," and similar expressions, to state those are headings at the top of the instrument or document.

The Court: This last document is dated when?

The Clerk: It was "revised January 1, 1942."

The Court: Is that "Hydro Generation Order No. 22"?

Mr. Sokol: Hydro.

The Clerk: Yes, sir.

The Court: It will be received into evidence and marked Plaintiff's Exhibit 4.

Mr. Sokol: I now offer as Plaintiff's Exhibit 5 a document entitled "Hydro Generation Order No. 22 Revised January 1, 1943." That consists of 7 pages.

The Court: It will be received into evidence and will be marked Plaintiff's Exhibit 5.

Mr. Sokol: May I inquire if you now have Edison Form 100 on the computation of pay, revised June 1, 1943? I have [72] a copy here if you want to check. If you are not prepared on that just now—

Mr. Woodbury: You asked for the form.

Mr. Sokol: No. I wanted the order providing for the method of compensation on these particular employees. Well, I think I will withhold that, so long as I understand that you will not object to the foundation if I offer that at the time of trial.

Mr. Sterry: Mr. Sokol, I can tell you, if you will, any of these that you want. We furnished, if your Honor please, anything he asked for, and then, Thursday Mr.

Sokol asked me for a number of documents and I was not able to get all of them. I am perfectly willing to let him admit this, if he wants to, subject to check. I have not had time to check this.

Mr. Sokol: That is your record.

Mr. Sterry: It looks like it.

Mr. Sokol: Suppose I withhold it and offer it at the time of the trial.

Mr. Sterry: Why don't you withhold it? Why don't you, whenever you get ready, submit these with all of them, and I will simply write you a letter stating to you that we make no objection to the foundation, if they are genuine. I am not disposed to make any objection, in any event, to any of our orders unless they are wholly and entirely immaterial in [73] my viewpoint; that is to say, if they have any question about them, we can meet that in the argument when it comes, rather than have any question. One or two of these later things Mr. Sokol asked for, if he got what he wanted, do not seem to me to have any bearing. In that case, I will object to it. Otherwise, it is my inclination to let it go in and discuss the relevancy of it with the other.

Mr. Sokol: Is it agreeable, since we are here, to introduce these few other exhibits?

Mr. Sterry: That I furnished you? Yes; put them all in.

Mr. Sokol: I mean the ones that I got your copies of? Have you checked those?

Mr. Sterry: Very frankly, I do not remember just what you have. I do not remember giving you a copy of these, Mr. Sokol.

Mr. Sokol: The other day in the office.

The Court: Will you be much longer?

Mr. Sokol: Well, your Honor, we can hold these for the trial.

The Court: No, no. I just thought we would give the reporter some relief.

Mr. Sokol: It should not be over five minutes.

The Court: We will take a recess of five minutes.

(Short recess.)

Mr. Sokol: If the court please, I think it would be [74] better if I would withhold offering any more exhibits, so that they might be of some meaning in the record when the proper testimony is offered. So I will not offer anything further at this time.

Mr. Sterry: I am heartily in accord with that, if your Honor please. Mr. Sokol has introduced some of these general orders 36-A without the accompanying orders of the operating department, which have to be read together, and without the testimony of witnesses they are somewhat meaningless. The reason I put these various schedules in is that they have been worked on by just one or two men and if something happened to them, I might have difficulty in making my proof. But they are in a different situation. I think it is not only proper, but I approve of both sides holding those, subject to the provisions of the court order that we have exhibited to each other before the trial any other documents that we think are pertinent.

The Court: Customarily I try to save the time on pre-trial hearing by marking the exhibits for identification, if there are any considerable number of them. If you wish to do that, we might.

Mr. Sokol: No; there won't be an awful lot, your Honor. I think we will have some later, probably.

Mr. Sterry: I do not believe it will have time, if your Honor please, in this particular case. [75]

The Court: That is the only purpose. That would be the only purpose of doing it. Is there anything further, gentlemen?

Mr. Sokol: Nothing,

The Court: Then let the order prepared in the Drake case show a setting of the consolidated cases for trial on June 3rd at 10:00 o'clock. Is that agreeable, gentlemen?

Mr. Sokol: That is agreeable.

Mr. Sterry: That is agreeable to both sides.

The Court: Very well; that will be the order. And in the Glenn case the court will enter an order setting it for trial at the same time, June 3rd, at 10:00 o'clock. Is there anything further?

Mr. Sterry: Nothing further, if your Honor please.

The Court: Very well; court will adjourn.

[Endorsed]: Filed Sep. 22, 1948. Edmund L. Smith, Clerk. [76]

[Endorsed]: No. 12071. United States Court of Appeals for the Ninth Circuit. Raymond F. Drake, et al., Appellants, vs. Southern California Edison Company, Ltd., Appellee. Transcript of Record. Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 22, 1948.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the
Ninth Circuit

United States Circuit Court of Appeals for the
Ninth Circuit

No. 12071

(D. C. Civil Action No. 5544-WM)

RAYMOND F. DRAKE, et al.,

Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
LTD., a corporation,

Defendant-Appellee.

STIPULATION EXTENDING PERIOD FOR FIL-
ING AND DOCKETING RECORD ON APPEAL

It Is Hereby Stipulated by and between the attorneys
for the respective parties hereto:

The time for filing the record on appeal and docketing
the action in the Circuit Court of Appeals for the Ninth
Circuit is, subject to the approval of the Court, extended
to and including October 25, 1948.

Dated: September 23, 1948.

DAVID SOKOL and

PACHT, WARNE, ROSS & BERNHARD

By Bernard Reich

Attorneys for Plaintiffs-Appellants

NORMAN S. STERRY

GIBSON, DUNN & CRUTCHER and

GAIL C. LARKIN

E. W. CUNNINGHAM and

ROLLIN W. WOODBURY

By Norman S. Sterry

Attorneys for Defendant-Appellee

[Endorsed]: Filed Sep. 27, 1948. Paul P. O'Brien,
Clerk.

[Title of United States Court of Appeals and Cause]

APPELLANTS' STATEMENT OF POINTS AND
DESIGNATION OF PORTIONS OF RECORD
FOR PRINTING

To the Clerk of the Above Entitled Court, to the Defendant-Appellee Above Named, and to Its Attorneys, Gail C. Larkin, E. W. Cunningham, Rollin E. Woodbury, Norman S. Sterry, Gibson, Dunn & Crutcher, Esqs.:

The following is the concise statement of points on which plaintiffs-appellants intend to rely on the appeal herein:

Statement of Points

I.

The trial Court erred in granting defendant-appellee's motion for summary judgment.

II.

The trial Court erred in not making and filing findings of fact and conclusions of law.

III.

The trial Court erred in dismissing the action for lack of jurisdiction of the subject matter of the action.

IV.

The trial Court erred in ruling that plaintiffs-appellants were not entitled to overtime compensation under the Fair Labor Standards Act of 1938, as amended.

V.

The trial Court erred in ruling that the certain activities alleged to have been engaged in by each plaintiff-appellant employed were made non-compensable by the Portal-to-Portal Act of 1947.

VI.

The trial Court erred in ruling that the Portal-to-Portal Act of 1947 was and is constitutional generally and as applied to the facts in this case.

VII.

The trial Court erred in ruling that defendant-appellee's motion for summary judgment should be granted.

VIII.

The trial Court erred in ruling that the action seeks to impose a liability upon the defendant employer as to each plaintiff-appellant for alleged activities which were not compensable within the purview of subsections (a) and (b) of section 2 of the Portal-to-Portal Act of 1947.

IX.

The trial Court erred in ruling that under subsection (d) of said section 2 of the Portal-to-Portal Act of 1947 the Court is without jurisdiction of the subject matter of said action.

Designation of Record for Printing

Plaintiffs-appellants designate for printing in the record on appeal the following:

* * * * *

Dated: November 22, 1948.

DAVID SOKOL and

PACHT, WARNE, ROSS & BERNHARD

By Bernard Reich

Attorneys for Plaintiffs-Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 26, 1948. Paul P. O'Brien,
Clerk.

No. 12070, 12071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

APPELLANTS' BRIEF.

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No. 12070, 12071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

APPELLANTS' BRIEF.

Statement of Jurisdiction.

This brief will cover two appeals taken from cases consolidated for trial below, and by stipulation, consolidated on appeal in so far as the rules of this Court permit. The cases are identical as to the general facts and law issues. Fact references, however, will be made primarily to the transcript of the Record in *Glenn, et al. v. Southern California Edison Company*, No. 12070.*

*Reference to the *Glenn* case will be made by "R....."; reference to the *Drake* case will be made by "Drake R.....". The order consolidating the cases for trial will be found in Drake R. 14. The stipulation consolidating the cases on appeal will be found in R. 336.

The first complaint was filed March 19, 1945, setting forth an action by employees against their employer for overtime compensation, liquidated damages and attorneys' fees under the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. A., §201, *et seq.*).

Following the enactment of the Portal-to-Portal Act of 1947, (Act of May 14, 1947, c. 52, 61 Stat. 84; 29 U. S. C. A. §251, *et seq.*), plaintiffs filed their third amended complaint on September 2, 1947 [R. 103]. Issue was joined by the defendant's answer to this pleading [R. 131]. Trial by jury was demanded [R. 219; Drake R. 76].

Section 16(b) of the Fair Labor Standards Act confers jurisdiction upon the District Court of the subject matter of the actions.

The District Court (Hon. William C. Mathes, District Judge), on May 18, 1948, granted defendant's motion for summary judgment and ordered the actions dismissed [R. 329; Drake R. 100].

Judgments of dismissal were signed and filed on June 8, 1948 [R. 331; Drake R. 103]. No findings of fact, conclusions of law or opinion were made or filed, except as the District Court's ground for dismissal may be set forth in its orders [R. 329; Drake R. 100].

Notices of appeal were filed by plaintiffs on June 29, 1948 [R. 334; Drake R. 106]. Defendant does not appeal from the said judgments.

This Court's jurisdiction to review is not questioned.

Concise Statement of the Case.

There follows under this heading a short, undocumented statement of the facts and the questions involved. A detailed statement with record references will follow under a subsequent heading.

These cases concern the right of employees to recover overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947, for work performed by the plaintiffs for the defendant. The work for which compensation is sought was performed prior to May 14, 1947.

Defendant is a public utility engaged in the generation, distribution and sale of electric power in interstate commerce. Plaintiffs, who were employees of the defendant, fell into four categories of employment:

- (a) Substation operators and attendants;
- (b) Relief substation operators and attendants;
- (c) Hydro employees;
- (d) Primary service men.

Except for the primary service men, most of the employees worked and lived in remote, lonely and out-of-the-way places on the property of the defendant. They were required by their employer to remain on duty for 24 hours of the work day.

The relief operators and attendants were required to travel from station to station and stay overnight away from their homes and families while performing 24 hour duty at successive stations for one or more days at a time.

The primary service men worked generally on 8 hour shifts, but at the termination of the particular shift, they were required to remain at their homes in order to be available to respond to emergency calls. They were paid

for "call-outs", but they were not paid for answering or disposing of matters over the telephone.

Quite apart from custom and practice, the plaintiffs were employed pursuant to instructions of the defendant, designated Order No. A-36, which order provided for a 40 hour work week with the following provision as to overtime: "Overtime for employees on a monthly rate of pay shall be paid at one and one-half times the average annual hourly rate. . . ."

Plaintiffs contend that they are entitled to 24 hours of pay for each day that they were on duty for that length of time. Defendant contends that it may divide the duties of plaintiffs into "active" and "inactive", and that it may compress both types of duties and evaluate them at but 8 hours per day.

Plaintiffs contend that they are entitled to compensation for active and so-called inactive services, both under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947. They contend that throughout the 24 hour tour of duty, the activities were the same and that there cannot be a distinction made between active and inactive duties. On the other hand, defendant contends that there were separable inactive services which were not compensable under the Portal-to-Portal Act.

The parties disagree strongly and decisively as to whether the defendant may avail itself of the defenses under Sections 9 and 11 of the Portal-to-Portal Act of 1947.

In these appeals, plaintiffs contend not only that summary judgment will not lie in cases of this kind, but that the trial court is laboring under such misconception of the applicable law that some guidance is needed from this Court if these cases are to be tried.

Specification of Errors.

It is respectfully submitted that the trial court erred:

1. In granting summary judgment to the defendant, in the face of plaintiffs' contention that summary judgment may not be granted under the Fair Labor Standards and Portal-to-Portal Acts where the issues of fact are complex and in dispute;

2. In holding that plaintiffs' activities were not compensable under the Portal-to-Portal Act of 1947, in the face of plaintiffs' contentions that:

- (a) Plaintiffs' services were compensable under the Fair Labor Standards Act;
- (b) Plaintiffs' services were not affected by the Portal-to-Portal Act;
- (c) Plaintiffs' services were compensable under express contract;
- (d) Plaintiffs' services were compensable under custom or practice;

3. In failing to find that the defendant did not meet the requirements of the good faith provisions of Sections 9 and 11 of the Portal-to-Portal Act, in the face of plaintiffs' contentions that:

- (a) Defendant was not relieved of its obligations by reason of Section 9 of the Portal-to-Portal Act, and
- (b) Defendant was not relieved of its obligations by reason of Section 11 of the Portal-to-Portal Act.

4. In failing to find that the application of the Portal-to-Portal Act to bar recovery by the plaintiffs would be an unconstitutional application of the statute, in the face of plaintiffs' contention that they are entitled to recovery under an express contract, irrespective of statute.

Detailed Statement of the Case.

THE PLEADINGS

Plaintiffs' third amended complaint alleged that they were employed by the defendant, which was engaged in the generation, distribution and sale of electric power, at monthly salaries based on 40 hours per week; that they worked in excess of 40 hours per week, but did not receive the compensation required by contract, custom and by law. A first cause of action was stated alleging that plaintiffs' employment was under an "express provision of an oral and written agreement in effect during all of the time of their employment" to pay overtime at the rate of one and one-half times the regular hourly rate [R. 107]. A second cause of action was stated, alleging that "by custom and practice in effect at the time of employment of plaintiffs" all of the overtime work of the plaintiffs was compensable [R. 111]. Plaintiffs prayed for an accounting of the hours worked by plaintiffs, overtime compensation, liquidated damages and attorneys' fees [R. 111].

The defendant, by its answer to the third amended complaint, denied the material allegations thereof and asserted the following affirmative defenses: (a) that there was an understanding between the parties that the monthly salary was to be the only compensation for all services rendered by the employees except for so-called "emergency service" [R. 137]; and (b) that defendant acted in good faith and in conformity with and in reliance upon cer-

tain Interpretative Bulletins, a decision of the National War Labor Board refusing premium pay to employees of another company, and a public statement in a radio broadcast by an official of the Wage and Hour Division that the defendant was operating in compliance with the Fair Labor Standards Act [R. 157-166].

PLAINTIFFS' EMPLOYMENT

The substation operators and attendants were employed at certain stations which the defendant maintained to a great extent in remote, lonely and out-of-the-way places [Deposition of H. L. Anderson, 5]. They lived in homes on the defendant's premises, and were under a duty to be present on the premises of the defendant at all times during the 24 hours of their work day [R. 114]. The substations at which they worked and had their homes were fenced off, and their activities devoted purely to personal pursuits were severely limited [R. 114]. Their duties, roughly, were to inspect the stations each morning, make routine trip tests, take hourly readings, report to central stations, maintain daily logs, and maintain the buildings and grounds in a clean and orderly condition [R. 115; Deposition of H. L. Anderson, 8].

They were required to be present at all times to answer emergency calls and be ready to respond to the exigencies of any situation that arose [R. 116]. They were not permitted to leave the premises of the defendant during their work days [R. 117]. At all times their personal life was severely interfered with, and their attention was di-

rected to the requirements of their jobs during the full 24 hours of their work days [Deposition of H. L. Anderson, 24]. They were paid a monthly salary, and overtime compensation only for duties which the defendant arbitrarily designated as "extraordinary or emergency active duty" [R. 119]. They were not paid overtime for the total time they were required to be present on the defendant's premises and attend to all necessary duties [R. 120].

The relief operators and attendants had the additional burden of traveling from station to station to relieve the regular operators and attendants. Their regular homes were not on the premises of the defendant and they were compelled to remain away from their homes and families while on duty in remote areas 24 hours per day [R. 120]. While on duty, they were supplied by defendant with small living quarters [R. 115]. Many of the plaintiffs, during the period involved in these cases, began as relief operators and attendants.

The hydro employees were likewise employed, as were the substation operators and attendants, in remote, lonely places where stations of the defendant were situated [Deposition of Clarence Rogers, 2, 29]. They were charged generally with the duty of keeping and maintaining the stations of the defendant in operation [Deposition of Clarence Rogers, 3, 6]. At all times during the 24 hours of each day of their work days, they were required to live and remain on the premises of the defendant, available for whatever duties they might be called upon to perform [R. 145; Deposition of Clarence Rogers, 16]. The presence of the hydro employees on defendant's premises, available for 24 hours per day, made it impossible for them to devote their time to their own personal activities

[Deposition of Clarence Rogers, 10, 11, 14]. They received a monthly salary purportedly to cover all work performed, and in addition received overtime compensation for the time actually spent in going out on emergency calls [R. 144, 145; Deposition of Clarence Rogers, 25, 26]. They received no compensation, however, for the time during which they were required to be present on the premises of the defendant for the benefit of the defendant [Deposition of Clarence Rogers, 26].

The primary service men worked generally on 8 hour shifts, at the termination of which they could go to their homes [R. 137]; subject, however, to the requirement imposed by the defendant that they remain at their homes in order to be able to respond to emergency calls [R. 138; Deposition of J. D. Borden, 16], or in the event they left their homes, to leave the telephone numbers where they could at all times be reached in order to answer emergency calls [R. 138]. The duties of the primary service men were generally to maintain the lines and all of the equipment connected with the lines in good working condition [Deposition of J. D. Borden, 33]. They were paid a monthly salary purportedly to cover all work performed, and in addition overtime only for the time actually spent on so-called emergency calls [R. 137; Deposition of J. D. Borden, 19].

At Santa Paula, the names of the primary service men were listed as such in the local telephone book, and they were required to take complaint calls at their residences from customers. This was the only office available to customers at night. The men were not paid for receiving these calls, but did receive overtime pay if they went out to perform "emergency services" [R. 138].

ADMITTED FACTS

The facts which are admitted or are not in dispute are as follows:

1. Apart from any custom and practice, plaintiffs were employed pursuant to defendant's Substation Division Order No. A-36 which, in part, reads as follows [Pltf. Ex. 2, pre-trial Drake, R. 172]:

"4. *Classification of Employees*

B. *Field and office employees* are classified and defined as:

- (1) *Shift employees*, which includes all classes of plant operators, guards, watchmen, and any other employee that may be temporarily assigned to this classification.
- (4) *Week-period employees*, which includes station attendants and any other employee who may be temporarily assigned to this classification.

5. *Hours of Labor*

B. *Field and office employees*

- (1) For *shift employees* the regular hours of work shall be any scheduled eight hours in a work-day. Forty hours of work shall constitute a work-week. Days off shall be equivalent to two days per work-week. The work-week is established as starting Monday and continuing through the following Sunday.

- (4) *Week-period* employes have no regular scheduled working hours and are subject to call twenty-four hours per day on each day worked. Forty hours of work shall constitute a work-week. Days off shall be equivalent to two days a work-week. The work-week is established as starting Monday and continuing through the following Sunday.

8. *Overtime compensation*

C. Overtime for employes on a monthly rate of pay shall be paid at one and one-half times the average annual hourly rate (see paragraph C3 following) except that, if working conditions permit, such overtime may be compensated for by either:

- (1) Requiring employes to take equivalent time off within the same work-week, or
- (2) Requiring employes to take time off in a subsequent work-week, but within the same pay period (1st to 15th, or 16th to the end of the month) on the basis of one and one-half hours off for each hour of overtime previously worked.
- (3) *Average annual hourly rate of pay:* With respect to an employe paid on a monthly salary basis, the monthly salary is subject to translation into its equivalent weekly wage for the purpose of payment of overtime and holiday compensation by multiplying the monthly salary by 12 (the number of months in a year) and dividing the result by 52 (the number of weeks in a year). The hourly rate is then determined by dividing the weekly wage by the normal scheduled working hours in each week."

2. Substation operators and attendants had no scheduled hours of employment, but were required to live on defendant's property for at least 5 days each week and to be available at all times, day or night, to render emergency services [R. 50, 140].

3. Hydro station attendants had no regular hours of employment, but were required to live on the property of the defendant during their working week and to be available at all times, day or night, for each day of their working week to render emergency services, if and when required [R. 145, 231, 234].

4. Primary service men had 8 hour shifts per day for 5 days during the week, but after the conclusion of their shifts, were required to leave a telephone number where they could be reached in order to be available at all times for emergency calls [R. 53, 137, 227].

5. Primary service men were paid a monthly salary and overtime for services performed during emergency call-outs during off-shift hours. They were not paid anything to receive telephone calls, nor for any of the time they were required to be available to respond to emergency calls [R. 138].

6. Substation operators and attendants were paid a monthly salary and overtime for services performed for emergency call-outs during the night time hours. They were not paid for any time during which they were required to be present on the defendant's premises available for call [R. 139].

7. Hydro station attendants were paid a monthly salary and overtime for services performed on emergency call-outs during night time hours. They were not paid for any time during which they were required to be present on defendant's premises available for call [R. 143, 144, 238].

8. At Santa Paula the telephone listings and basis for payment was as has been seen [R. 138].

DISPUTED FACTS

The facts in dispute are:

1. The existence or non-existence of an oral and written agreement whereby plaintiffs were employed at a stipulated monthly salary based on 40 hours a week, and were to receive in addition thereto additional compensation at one and one-half times their regular hourly rate for all hours worked in excess of 40 hours per week [R. 107, 118, 137].

2. The existence or non-existence of an agreement between the parties that the monthly salary paid to the substation operators and hydro employees was to be full compensation for all services [R. 142, 314, 320].

3. Whether or not so-called normal "active" services of substation operators and hydro employees required only 2 to 5 hours per day [R. 45, 50, 139, 234, 304].

4. The existence or non-existence of an agreement that the parties had agreed that an evaluation of the total hours

of work devoted to the defendant, consisting of both active and inactive duties, was the equivalent of 8 hours per day or 40 hours per week [R. 50, 80, 144, 304].

5. The existence or non-existence of a custom or practice that all hours in which plaintiffs were available for duty were compensable [R. 111, 154, 175, 314].

6. Whether or not plaintiffs were required by the defendant to record on weekly time sheets only 8 hours per day normal working time, notwithstanding they worked in excess of 8 hours per day [R. 91, 96, 313].

7. The existence or non-existence of an agreement between the parties whereby a designation was made between so-called "active" and so-called "inactive" duties of the substation operators and hydro employees [R. 139, 304].

8. Whether or not the defendant acted in good faith and in conformity with and in reliance on (1) Interpretative Bulletin No. 13, (2) a decision of the National War Labor Board involving employees of the Pacific Gas and Electric Co., and (3) the public statement of the Southern California manager of the Wage and Hour Administrator [R. 157-166, 297, 298].

ARGUMENT

POINT I

Summary Judgment May Not Be Granted Under the Fair Labor Standards or Portal-to-Portal Acts Where the Issues of Fact Are Complex and in Dispute.

Cases arising under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947 are generally concerned with complex fact situations and are consequently not subject to summary judgment.

Kennedy v. Silas Mason Co., 334 U. S. 249, 92 L. ed. (Adv. Op.) 989 (1948);

**Twigg v. Yale & Towne Mfg. Co.*, 7 F. R. D. 488 (U. S. D. C. N. Y., 1947).

In the *Silas Mason* case, *supra*, the Supreme Court stated (334 U. S. at 256, 92 L. ed. (Adv. Op.) at 992):

“ . . . No conclusion in such a case should prudently be rested on an indefinite factual foundation. The case, which counsel have described as a constantly expanding one, comes to us almost in the status in which it should come to a trial court. In addition to the welter of new contentions and statutory provisions, we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select

*Notwithstanding plaintiffs' own motion for partial summary judgment, their counsel cited the above case to the Trial Court as prohibiting the granting of summary judgment to either party herein. Plaintiffs' motion was therefore in effect withdrawn. In any event, however, the issues of fact were not resolved by reciprocal motions. *Begnaud v. White*, 170 Fed. 2d 323, 327 (C. C. A. 6, 1948).

relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.”

In *Twigg v. Yale & Towne Mfg. Co.*, *supra*, the District Court, in denying a motion to dismiss in a case arising under both the Fair Labor Standards and Portal-to-Portal Acts stated (7 F. R. D. at 491):

“Whether or not certain other claims pleaded in the complaint are properly the subject of suit in this Court in view of the provisions of the Portal-to-Portal Act, is a mixed question of fact and law, which cannot be considered on a motion directed to the pleadings under Rule 12(b)(1) and (6). Further, lack of jurisdiction over the subject matter of a claim is a defense which may be asserted in the responsive pleading. Rule 12(b). An orderly administration of Justice in cases such as this would seem to require that the defense of the Portal-to-Portal Act should be pleaded in the defendant’s answer. To determine the issues of fact, which that defense might create, would require a trial of the action

itself. I do not believe that the question of jurisdiction can, in such a case, be determined in advance of trial, even on a motion for summary judgment based on supporting affidavits. Rule 56. The conflicting statements in the affidavits submitted on this present motion support that conclusion.”

In the instant cases, the facts are even more complex, intricate, extensive and difficult than they were in the Supreme Court and other cases cited above. These appeals require this Court of three or more to “pick” its way among “over a score of” depositions, affidavits, answers to interrogatories and other documents. The difficulty is illustrated by an incident below. The trial court made its judgments long before it was discovered that certain of the depositions taken in the cases had not been filed, although the court’s decision had apparently been made upon all depositions [R. 356]. We do not intend by this statement to find fault with the trial court in this connection; the fault lies more with counsel. However, it does illustrate, as the Supreme Court has indicated, the difficulty with deciding cases of this kind summarily.

We have already indicated what facts and questions are in dispute. Generally, they concern the employment relationship between the plaintiffs and defendant; whether a contract, custom or practice existed for the payment of overtime; whether the plaintiffs worked more than the eight hours set forth on the time cards; whether plaintiffs were entitled to payment for standby time; and whether the defendant acted in good faith and in reliance upon material and officially binding interpretations and orders of the Wage and Hour Division, or of any administrative ruling of an agency of the United States.

Courts have invariably refused summary judgment where even one of the facts above recited was in dispute.

For example: One of the principal issues in this case is whether plaintiffs in being required to remain on the defendant's premises for 24 hours a day were entitled to overtime compensation, and if so, for how many hours.

In *Skidmore v. Swift & Co.*, 323 U. S. 134, 89 L. ed. 124 (1944), involving firemen who were required to stay on their employer's premises for 24 hours a day, the Supreme Court stated (323 U. S. at p. 136, 89 L. ed. at p. 127):

“ . . . We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts, as are the many situations in which employment involves waiting time.* Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.”

Take the example of defenses urged by defendant under Sections 9 and 11 of the Portal-to-Portal Act: In substance, defendant contends its practices were in accordance with Interpretative Bulletin No. 13 issued by the Wage and Hour Administrator, and that it furthermore relied upon a decision of the National War Labor Board denying premium pay to employees of another company, and on a statement made in the course of a radio program.

*See R. 113, 140, 145, herein.

It has been invariably held that these defenses involve mixed issues of law and fact and cannot be properly disposed of by summary judgment.

Sheppard v. American Dredging Co., 77 F. Supp. 73 (U. S. D. C. Pa., 1948) ;

Camiano v. Rifkin, 77 F. Supp. 363 (U. S. D. C. N. Y., 1948) ;

Divins v. Hazeltine Electronics Corp., 79 F. Supp. 513 (U. S. D. C. N. Y., 1947) ;

Halsband v. George A. Fuller Co., (N. Y. City Court, 1948) 14 Labor Cases, par. 64,387, p. 73,023.

In *Camiano v. Rifkin*, *supra*, the Court stated (77 F. Supp. at 364) :

“Defendant’s defenses under Sections 9 and 11 of the Portal-to-Portal Act of 1947 . . . must be tried since his good faith has been made a question of fact by the affidavits.”*

In *Divins v. Hazeltine Electronics Corp.*, *supra*, the Court, in denying summary judgment stated (79 F. Supp. at 514) :

“Section 9 of the Portal-to-Portal Act of 1947, . . . requires the defendants to prove that they acted *in good faith*. I think that this issue of good

*See R. 297, 298, herein.

faith, depending, as it does, upon many factors, should be left to the determination of the trial court upon consideration of all the evidence adduced by both parties. Good faith cannot be established as a simple fact, such as the signature to a document. It is an ultimate fact—a conclusion to be drawn from all the circumstances. Only in rare situations can it be determined upon affidavits.”

It would appear axiomatic that summary judgment should not be granted when the facts presented are in dispute.

Aaron Ferrer & Sons v. Richfield Oil Corp., 150 Fed. 2d 12 (C. C. A. 9, 1945);

Burley v. Elgin, J. & E. Ry. Co., 140 Fed. 2d 488 (C. C. A. 7, 1943), aff'd 325 U. S. 711, 89 L. ed. 1886 (1945);

Wittlin v. Giacalone, 154 Fed. 2d 20 (C. A. of D. C., 1946);

Doehler Metal Furniture Co. v. United States, 149 Fed. 2d 130 (C. C. A. 2, 1945).

It will be noted that the District Court did not grant summary judgment requested by the defendant, but dismissed the actions on its own motion [R. 330, 333; Drake R. 100, 105]. The theory apparently was that the District Court did not even have sufficient jurisdiction to grant summary judgment. While we have little quarrel with the *form* of disposition, we must point out that the form adopted by the court below illustrates the inad-

visability of summary disposition of cases of this kind. For, it is well settled that an action should not be dismissed "unless it appears certain that plaintiff is not entitled to relief under any state of facts which could be proved."

Carroll v. Morrison Hotel Corporation, 149 Fed. 2d 404, 406 (C. C. A. 7, 1945);

Dollar v. Land, 154 Fed. 2d 307, 309 (C. A. of D. C., 1946).

If, then, plaintiffs are entitled to recover under any state of the facts which they *could* prove, the District Court could not properly dismiss where there is an allegation of an express, written or oral contract, or an allegation of a custom or practice. It would seem clear that the District Court erred in disposing of the claims of the plaintiffs without the jury trial they demanded, and after three years of intensive litigation in which numerous affidavits, admissions, interrogatories and depositions were had and filed.

It would seem equally clear that the many disputed questions of fact and intricate questions of law should not have been disposed of in this sudden, summary manner. If, however, the court below is correct in its view of the law, it would be better for all concerned to know it now. On the other hand, if the court below is in error, it would greatly expedite the trial of the actions herein were this Court to enunciate the correct principles of law which are applicable to the law issues hereinafter discussed.

POINT II

Plaintiffs' Services Were Compensable Under the Fair Labor Standards Act.

The Fair Labor Standards Act of 1938 provides in part as follows:

“Sec. 207. Maximum hours

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”

Act of June 25, 1938, c. 676, §7, 52 Stat. 1063, as amended Oct. 29, 1941, c. 461, 55 Stat. 756; 29 U. S. C. A., §207.

It has been well established that where an employee is required to remain on the premises of the employer in order to be available to perform whatever duties may be required of the employee by the employer, all of the time so spent by the employee for the benefit of and in behalf

of the employer is compensable under the Fair Labor Standards Act of 1938.

Armour & Co. v. Wantock, 323 U. S. 126, 89 L. ed. 118 (1944);

Skidmore v. Swift & Co., 323 U. S. 134, 89 L. ed. 124 (1944).

In *Skidmore v. Swift & Co.*, *supra*, the plaintiffs, firemen, in addition to their regular shift, were obliged to stay on the premises of their employer for 3½ hours to 4 hours per week, at night, in order to answer alarms. For each alarm answered the plaintiff received 64¢. The company provided sleeping and recreation quarters. The lower court, relying in part on Interpretative Bulletin No. 13 of the Wage and Hour Division, held, as a conclusion of law, that this night time activity was not working time under the Fair Labor Standards Act. The Supreme Court *reversed* and remanded, stating (323 U. S. at 136, 89 L. Ed. at 127):

“For reasons set forth in the *Armour & Co.* case decided herewith, we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. *Walling v. Jacksonville Paper Co.*,

317 U. S. 564, 572, 87 L. ed. 460, 468, 63 S. Ct. 332. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. *Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself.* Living quarters may in some situations, be furnished as a facility of the task and in another as part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.” (Emphasis added.)

Plaintiffs here, as was the case of the workers in the *Armour* and *Skidmore* cases, were not waiting for their own convenience or for an opportunity to perform services for which they would be compensated, but were employed specifically to remain and be present at all times on the premises of the defendant employer [R. 140, 145], or to leave telephone numbers where at all times they could be reached in order to perform certain other duties [R. 138].

All of the activities of plaintiff, irrespective of whether designated by the defendant employer as “active” or “inactive,” constituted the performance of work purely for the benefit of the defendant and were an integral part of

the very employment for which the plaintiffs were hired. The holdings of the Supreme Court in the *Armour* and *Skidmore* cases clearly compel the conclusion that the plaintiffs were performing "work" within the meaning of the Fair Labor Standards Act, for which work plaintiffs were entitled to be compensated at overtime rates in conformity with the requirements of the Act. Furthermore, it was beyond the power of both plaintiffs and defendant, employees and employer, to enter into any agreement which would have eliminated, as compensable, that portion of the work which the employer arbitrarily held to be "inactive."

Johnson v. Dierks Lumber & Coal Co., 130 Fed. 2d 115, 120 (C. C. A. 8, 1942).

In the last mentioned case, the Eighth Circuit plainly stated:

"We do not think the act means that an employer may claim all of an employee's time and compensate him for only a part of it. *An agreement to pay for only a part of the hours which an employee is required to serve is invalid.* The purpose of Congress in enacting the statute cannot be thus frustrated." (Emphasis added.)

POINT III

Plaintiffs' Services Were Not Affected by the Portal-to-Portal Act of 1947.

In the development of judicial construction of the Fair Labor Standards Act, the courts extended the application of the Act to include claims for certain types of so-called portal-to-portal activities which theretofore had not been traditionally regarded as compensable work. The activities consisted generally of efforts preliminary to the performance of the job such as walking to and dressing for the performance of work, and efforts following the conclusion of the day such as washing up, walking from and leaving the job. Under the Fair Labor Standards Act, the courts went far in holding certain of these activities to be work within the meaning of the Act.

Thus, in *Tennessee Coal Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U. S. 590, 88 L. ed. 949 (1944), the Supreme Court held that the time spent by iron-ore miners in traveling to and from the face of the mine constituted working time under the Act; and in *Jewell Ridge Coal Corporation v. Local No. 6167 U. M. W.*, 325 U. S. 161, 89 L. ed. 1534 (1945), the Supreme Court held that the time spent by bituminous coal miners in traveling to and from the face of the mine was likewise compensable under the Act.

The Supreme Court reached the most sensational result in *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 90 L. ed. 1515 (1946), where it was held that the time spent by workers in punching in, preparing for work and walking to their working places prior to the beginning of their regular work day constituted work within the meaning of the Fair Labor Standards Act. With this decision, the courts were flooded with litigation, and Con-

gress, taking cognizance of the three decisions, and more specifically, of the *Mt. Clemens* decision in 1946, overwhelmingly enacted the Portal-to-Portal Act of 1947.

It is clear both from the history of the Act and from its preamble that it was intended and designed only to outlaw claims for portal-to-portal activities. There was no public clamor raised by the *Armour* and *Skidmore* cases; the great demand for enactment of the Portal-to-Portal Act came only after and was designed to overcome the decision in the famous *Mt. Clemens Pottery* case, *supra*, which had followed in the wake of the *Tennessee Coal* and *Jewell Ridge* cases.

The discussions in Congress, the various hearings by subcommittees, and all of the publicity involving the *Mt. Clemens* case, indicate that the Portal-to-Portal Act was enacted to meet the situation conjured up by that series of decisions.

“*The Portal-to-Portal Act of 1947*,” The Bureau of National Affairs, 1-5 (1947); 3 A. L. R. 2d 1097, 1125 (1949).

Thus, Congress, in enacting the Portal-to-Portal Act, found “that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices and contracts between employers and employees, thereby creating wholly unexpected liabilities. . . .”

Act of May 14, 1947, c. 52, §1, 61 Stat. 84, 29 U. S. C. A. §251.

It is obvious that the specific reference to judicial interpretation and disregard of long-established custom was directed not against the *Armour* and *Skidmore* cases, but to the *Mt. Clemens*, *Tennessee Coal* and *Jewell Ridge* cases. So the President of the United States in his message to

Congress approving the Portal-to-Portal Act understood the intention of the Act:

“Section 2 of the Act relates to existing claims. From my consideration of this Section, I understand it to be the intent of the Congress to meet the problem raised by portal-to-portal claims, but not to invalidate all other existing claims. The plain language of Section 2 of the Act preserves minimum wage and overtime compensation claims based upon activities which were compensable in any amount under contract, custom or practice. Various provisions of the Act such as Sections 3, 9, and 12, would be rendered absurd or unnecessary under any other interpretation. Moreover, a contrary interpretation would raise difficult and grave questions of constitutionality.” (93 Cong. Rec. 5281, May 14, 1947.)

This position, to wit, that the Portal-to-Portal Act was not meant to apply to claims other than portal-to-portal activities has been supported in judicial opinion.

Central Missouri Tel. Co. v. Conwell, 170 Fed. 2d 641 (C. C. A. 8, 1948), aff'g 76 F. Supp. 398 (U. S. D. C. Mo., 1948);

Mauro v. Malcolm M. Slaughter & Co., (U. S. D. C. N. Y., 1948) 14 Labor Cases, par. 64,299, p. 72,715;

Tricomi v. Palumbo Cigar Company, Inc., (N. Y. Sup. Ct., 1948) 14 Labor Cases, par. 74,438, p. 73,211;

Curtis v. McWilliams Dredging Co., (N. Y. City Court 1948) 14 Labor Cases, par. 64,352, p. 72,890.

In *Central Missouri Tel. Co. v. Conwell*, *supra*, the Eighth Circuit stated (170 Fed. 2d at 645):

“In the instant case there is no claim seeking to recover for time consumed in walking to work or

other activities either before or after the normal working hours. Here the claim is that these employees actually worked many hours in excess of the forty hours permitted by the Fair Labor Standards Act, not for activities of a Portal-to-Portal nature, such as were involved in *Anderson v. Mt. Clemens Pottery Company*, *supra*, and we agree with the trial court that it was not the purpose of the Portal Act to destroy such claims.

“Section 207 of the Fair Labor Standards Act provides that, ‘No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce— * * * for a workweek longer than forty hours * * *, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.’

“We are of the view that this provision of the Fair Labor Standards Act was neither repealed nor so modified as to make it necessary to plead, in an action to recover compensation for time actually devoted to the normal work for which the employee was employed, an express written contract or unwritten contract, or a practice or custom. *Jackson v. Northwest Air Lines*, D. C. Minn., 76 F. Supp. 212. The court therefore had jurisdiction of the action and properly denied defendant’s motion to dismiss.”

In *Mauro v. Malcolm M. Slaughter & Co.*, *supra*, the United States District Court in New York, discussing the application of the Portal-to-Portal Act of 1947 to non-portal claims, stated (14 Labor Cases, par. 64,299 at p. 72,720) :

“It is to be noted, at the outset, that there is no claim here except for overtime and liquidated dam-

ages customarily and usually sought for hours actually worked, and not for any travel or preparation, or walking or preliminary or postliminary time claimed similar to that sought to be recovered in *Jewell Ridge Coal Co. v. Local No. 6167 U. M. W.*, 325 U. S. 161, and *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680. The purpose not to outlaw a claim such as here made is obvious from a reading of the act which states that it is to 'relieve employers from *certain liabilities*' (obviously not all) and of section 1 of the Portal-to-Portal Act. . . . That a claim such as the present was not intended to be barred is, I think, obvious from the President's message accompanying his approval of the Act."

As the quotations from the President's message and the decisions of the courts indicate, and as we have already pointed out, portal-to-portal activities are those which exist primarily for the benefit of the employee, not the employer, and which generally involve preparation for work and cleaning up after work. The services rendered by the plaintiffs herein were not portal-to-portal activities, and were neither preliminary nor postliminary to the duties they were engaged to perform. The work done by these plaintiffs was part and parcel of the employment for which they were engaged. Part of their work consisted in waiting around between active duties to perform "emergency services." In the words of the Supreme Court, the plaintiffs were "engaged to wait" and were not waiting "to be engaged."

Skidmore v. Swift & Co., 323 U. S. 134, 137, 89 L. ed. 124, 128 (1944).

It has been seen that the Portal-to-Portal Act of 1947 does not affect this type of work.

POINT IV

Plaintiffs' Services Were Compensable Under Express Contract.

The Portal-to-Portal Act of 1947, in part, provides as follows:

“(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either— (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; . . .”

Act of May 14, 1947, c. 52, §2, 61 Stat. 85; 29 U. S. C. A. §252.

The plaintiffs herein rendered their services under the terms of and in accordance with an express written agreement to receive overtime compensation at the rate of one and one-half times the normal rate of pay.

The defendant's substation division Order No. A-36, offered at the pretrial hearing as Plaintiffs' Exhibit No. 2, sets forth working conditions and payment of wages applicable to the plaintiffs. *Supra*, pp. 10 and 11.

In *Joshua Henry Corp. v. Mills*, 169 Fed. 2d 898 (C. C. A. 9, 1948), this Court had before it a substantially simi-

lar contract, reading in part as follows (169 Fed. 2d at 900):

“4. Hours of Employment and overtime.

Forty (40) hours shall constitute a work week, eight (8) hours per day, five (5) days per week, Monday to Friday, inclusive, between the hours of 8 a. m. and 5 p. m., except that where, as to any locality or as to any plant of any employer, existing traffic conditions render it desirable to start the day shift at an earlier hour, such starting time may, with agreement of the employer affected and the local Metal Trades Council, be made earlier, but in no event earlier than seven (7) a. m. Overtime at the rate of one and one-half times the established hourly rate shall be paid for all work performed in excess of eight (8) hours per day and forty (40) hours per week.

. . .”

In the last mentioned case, the plaintiffs claimed overtime for one-half hours per day which was worked in addition to the 8 hour shift. The defendant contended that it was relieved from liability under the Portal-to-Portal Act by reason of the times when the employees worked only seven and one-half hours. This court rejected the defendant's contention and held that there was an express contract making the activity compensable within the meaning of the Portal-to-Portal Act. It stated (169 Fed. 2d at 900):

“It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the work week at 40 hours straight time and 8 hours overtime and further provides for the payment of overtime for all ‘work performed’ in excess of 40 hours per week. Mills

performed 11 hours work in excess of 40 hours within the meaning of the phrase 'work performed.' He was paid for 8 hours overtime only."

Paragraph 5B (4) of Order No. A-36, herein, specifically states that 40 hours of work shall constitute the work week. It is further specifically provided in paragraph 8C that overtime shall be paid at the rate of one and one-half times the hourly rate. The instant case therefore falls directly within the facts and the holding of this Court in the *Mills* case, *supra*. It follows that an agreement to pay for overtime services is an agreement to pay for all overtime services irrespective of when those services are performed.

See also:

Devine v. Joshua Hendy Corp., 77 F. Supp. 893, 905 (U. S. D. C. Cal., 1948);

Lewellen v. Hardy-Burlingham Min. Co., 73 F. Supp. 63, 66 (U. S. D. C. Ky., 1947);

Frank v. Wilson & Co. Inc., (U. S. D. C. Ill., 1948) 14 Labor Cases, par. 64,296, p. 72,699.

In *Lewellen v. Hardy-Burlingham Min. Co.*, *supra*, the plaintiff was employed as an industrial policeman at an agreed salary per month. He worked 104 hours per week without being paid overtime. The court held for the plaintiff and stated (73 F. Supp. at 66):

"Since the activity on account of which the plaintiff seeks overtime compensation was an activity which

was compensable under the terms of his contract of employment, in effect at the time of such activity, defendant is not relieved from liability under the provisions of Section 2 of the Portal-to-Portal Act of 1947, 29 U. S. C. A. §252.

“Under the evidence, plaintiff’s claim in this action is not precluded by the provisions of Section 9 of the Portal-to-Portal Act of 1947, 29 U. S. C. A. §258.”

The nature of the work for which plaintiffs were hired was, in substance, to be present and to perform their duties at all times during every work day on the premises of the defendant, or in the case of the primary service men, to leave a telephone number where they could at all times be reached in order to perform such emergency services as might be necessitated by the defendant in the operation of its business. The presence of plaintiffs on defendant’s premises, available for call, was one of the most conspicuous aspects of and inseparable from their other duties.

Actually, the defendant’s position at one time was not that the plaintiffs’ inactive duties were not compensable, but was that plaintiffs were being compensated therefor. In 1945, the defendant submitted to the National War Labor Board a request for approval of a salary adjustment for certain hydro workers, relief headworks tenders, and other substation operators and attendants. It will be recalled that any increase in wages required the approval

of the National War Labor Board. In the said application defendant stated:

“ ‘10. Heretofore, certain of the Company’s positions of Headworks tenders and attendants at substations classified as Group D and E have included as part of the inactive duties attached thereto the requirement that men holding such positions remain on the Company’s premises or in their homes on or adjacent thereto up to twenty-four hours a day on certain days each week and over forty hours during each week. Such men have been and are paid specified salaries on a monthly basis for these positions. The Company desires to change its method of operation so as to eliminate the requirement that such employees so remain throughout such periods and to prescribe that no such employee will be required to so remain on the Company premises or in his said home more than forty hours during any work week in performing both his active and inactive duties. However, while eliminating this one inactive factor of the job of having to remain on the premises more than forty hours during any work week, the Company desires to continue to pay to each of these employees his present monthly salary, leaving the present rate changes intact.’ ” [R. 291, 316; Exhibit B to Defendant’s Response to Plaintiffs’ Request for Admission dated November 21, 1947.]

The defendant thus admitted by its application that it paid so many dollars for 24 hours per day’s work and that thenceforth it wanted to pay the same number of dollars for 8 hours per day’s work. While the defendant asserted that it paid for all time, active and inactive, it wished now in effect to raise the plaintiffs’ pay by permit-

ting the plaintiffs to work less hours for the same pay they had theretofore been receiving.

Where overtime duties are an integral part of the employment of the employee, those activities are compensable by contract.

Marchant v. Sands Taylor & Wood Co., 75 F. Supp. 783, 787 (U. S. D. C. Mass., 1948);

Green v. LeVan, (U. S. D. C. Tenn., 1948) 15 Labor Cases par. 64,777, p. 74,479.

In the *Marchant* case, *supra*, the court said at page 787:

“Defendant’s contention that Section 2 (a) of the Portal-to-Portal Act exempts it from liability is without merit. The activities of the plaintiff embraced in the claimed overtime here were compensable by contract with his employer. They were activities he was required to perform by his contract of employment and there is no reason why, if he is entitled to the benefits of the Fair Labor Standards Act, he should not be paid for them. There is nothing in this section of the Portal-to-Portal Act that relieves the employer here from payment.”

Even without a specific agreement to pay for overtime entered into between the employer and the employees, there is in all employment relations a contract to pay overtime for work in excess of 40 hours per week by reason of the fact of the incorporation into every contractual relationship of the provisions of the Fair Labor Standards Act.

Conwell v. Central Missouri Tel. Co., 74 F. Supp. 542 (U. S. D. C. Mo., 1947), 76 F. Supp. 398 (U. S. D. C. Mo., 1948), *aff’d* 170 Fed. 2d 641 (C. C. A. 8, 1948).

POINT V

Plaintiffs' Services Were Compensable Under Custom or Practice.

The Portal-to-Portal Act of 1947 provides in part as follows:

“(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

* * * * *

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.”

Act of May 14, 1947, c. 52, §2, 61 Stat. 85; 29
U. S. C. A. §252.

The plaintiffs herein rendered and the defendant accepted their services under a general custom and practice that all of the plaintiffs' activities on behalf of and de-

voted to the benefit of the defendant were to be paid for by a weekly or monthly salary [R. 111]. The defendant contended below that certain of the work of the plaintiffs was “inactive” and therefore not compensable [R. 137, 139, 143]. However, the defendant also contended below that so-called “active” duties of plaintiffs could be performed in between two to five hours per day, but that in evaluating the employment as a whole, the services of the plaintiffs, that is both the “active” and “inactive” duties were the equivalent of 8 hours per day [R. 140, 143]. The defendant by its own admission, therefore, was paying the plaintiffs a fixed wage not only for what the defendant chose to designate “active” duties, but was also paying plaintiffs for so-called “inactive” duties. A custom and practice was thereby established by the plaintiffs to pay for all work irrespective of the nature and description of the constituent elements constituting and making up the totality of the efforts expended by the plaintiffs.

Under the circumstances, therefore, it is clear that plaintiffs’ services were compensable under custom or practice.

Frank v. Wilson & Co., Inc., (U. S. D. C. Ill., 1948) 14 Labor Cases par. 64,296, p. 72,699;

Central Missouri Tel. Co. v. Conwell, 170 F. 2d 641 (C. C. A. 8, 1948), aff’g 76 F. Supp. 398 (U. S. D. C. Mo., 1948);

Mauro v. Malcolm M. Slaughter & Co., (U. S. D. C. N. Y., 1948) 14 Labor Cases par. 64,299, p. 72,715.

POINT VI

Defendant Was Not Relieved of Its Obligation to Compensate Plaintiffs for Their Work Under the Provisions of Section 9 of the Portal-to-Portal Act.

The Portal-to-Portal Act of 1947, in part, provides as follows:

“In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.”

Act of May 14, 1947, c. 52, §9, 61 Stat. 88; 29 U. S. C. A. §258.

In order to come within the provisions of Section 9 of the Portal-to-Portal Act, the defendant must meet all of the requirements of the statute. It must plead and prove

that it acted (1) in good faith, (2) in conformity with, and (3) in reliance on, (4) any administrative regulation, order, ruling, approval or interpretation of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belongs.

Burke v. Mesta Machine Co., 79 F. Supp. 588, 606 (U. S. D. C. Pa., 1948);

General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, §790.13, 12 F. Reg. 225, p. 7655 (Nov. 18, 1947).*

In *Burke v. Mesta Machine Co.*, *supra*, the court stated (79 F. Supp. at 606):

“Section 9 requires by its specific terms that defendant must plead and prove that the omission to pay plaintiffs according to the Fair Labor Standards Act was (1) in good faith, (2) in conformity with, and (3) in reliance upon, (4) any administrative regulation, order, ruling, approval or interpretation of any agency of the United States or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Thus, the burden of proof is placed specifically upon defendant, and that burden must be sustained by defendant with respect to each of the four requirements.”

*Hereinafter for convenience termed “General Statement.”

In the "General Statement" it is stated (Section 790.13):

" . . . In all cases, however, the act or omission complained of must be both 'in conformity with' and 'in reliance on' the administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy, as the case may be, and such conformance and reliance and such act or omission must be 'in good faith.' "

The defendant's answer herein alleges reliance on paragraphs 6, 7 and 8 of Interpretative Bulletin No. 13 issued by the Wage and Hour Administrator [R. 158, 159, 160]. These paragraphs, in substance, deal with the problem of waiting time as "work" within the meaning of the Fair Labor Standards Act. More particularly, paragraph 8 of said Bulletin, in part, provides [R. 160]:

"8. In some cases employees may be subject to call after the completion of their regular working day; employees may be called upon after regular working hours to furnish emergency service to customers. If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered hours worked."

Interpretative Bulletin No. 13, and more particularly paragraph 8 thereof, was, as early as 1944, specifically construed by the Supreme Court in *Skidmore v. Swift & Co.*, 323 U. S. 134, 89 L. ed. 124 (1944). There, the Supreme Court held that the time the plaintiffs were required to remain on the premises of the employer was compensable working time, since the waiting or confinement of the employees to the premises of the employer was for the benefit of the latter, and since the duties of the employees

did not fall within the examples set forth in the said Interpretative Bulletin.

It is not to be supposed that defendant had no knowledge of the construction given Interpretative Bulletin No. 13 by the United States Supreme Court. Defendant cannot assert good faith in purportedly relying on the Bulletin. Good faith requires honesty of intention and no knowledge of circumstances which would throw doubt on the employer's honesty of action.

General Statement, Sec. 790.15.

The construction of the Bulletin to the advantage of the defendant, and the purpose intended to be served by it without reference to the holding of the United States Supreme Court in the *Skidmore* case, is in itself an indication of the lack of the good faith required by the statute. It is not good faith within the meaning of Section 9 to rely on rulings which are favorable to the defendant when there is knowledge of circumstances in conflict with the rulings.

Glowienke v. Hawaiian Dredging Co., (U. S. D. C. Ill., 1948) 14 Labor Cases par. 64,343, p. 72,867.

The requirement that the employer act "in conformity with" the administrative regulation is just as important an element of Section 9 as any other requirement. Inasmuch as the facts of plaintiffs' employment here do not specifically fall within any of the examples given in the said Interpretative Bulletin, the defense of the defendant in this connection must fall.

Central Missouri Tel. Co. v. Conwell, 170 Fed. 2d 641, 648 (C. C. A. 8, 1948).

In the last mentioned case the employees were switch-board operators who were on duty eleven hours per night but were paid for only eight hours. During all the period they were on duty, however, they were required to respond to calls. The employer sought to rely, as the defendant does here, upon the above cited Interpretative Bulletin. The court rejected the defense asserted by defendant, stating (170 Fed. 2d at 648):

“We think the trial court correctly held that Bulletin No. 13, referred to in the record, did not describe the conditions under which plaintiffs were working at their respective stations, and hence, defendant was not exonerated from liability.”

The defendant further alleged, in support of its defense under Section 9, that it relied upon a decision of the National War Labor Board denying an increase in pay for employees of The Pacific Gas and Electric Co., another employer, who allegedly were performing duties similar to the plaintiffs [R. 160-165]. The defendant cannot in good faith assert reliance on such a decision because there the National War Labor Board was not concerned with the problem of whether or not the activities of the employees were work within the meaning of the Fair Labor Standards Act, but was dealing only with the problem of whether, under wartime restrictions, the employees were entitled to an increase in pay [R. 164].

The lack of good faith of the defendant in asserting that it relied on the aforesaid decision of the National War Labor Board that the activities of the plaintiffs were not “work” is conclusively shown by the request, hereinbefore alluded to, made by defendant in 1945 to the National War Labor Board requesting permission to elimi-

nate the requirement that the plaintiffs remain on the premises twenty-four hours a day for the same pay which they had theretofore been earning. The defendant by this act gave evidence of its recognition of the fact that the plaintiffs were at all times performing work during their twenty-four hour tour of duty for which they received compensation. Otherwise, there would have been no necessity for the defendant to petition the National War Labor Board for what it regarded as an increase of pay if the employees were to receive the same salary for an eight-hour day as they received for working twenty-four hours per day. (*Supra*, p. 35.)

Defendant further offered, in support of its defense under Section 9, purported reliance on a public relations radio broadcast by the Southern California representative of the Administrator of the Fair Labor Standards Act to the effect that the defendant was operating in "complete compliance with the Act."

Section 9 is clear in its requirement that there be an administrative regulation, order, ruling, approval or interpretation of an *agency* of the United States. It is not to be supposed that in setting up the availability of the statute as a defense to actions for overtime, there was any intention to elevate the unofficial statements of local officials to the dignity of an administrative ruling of an agency of the United States.

Jackson v. Northwest Air Lines, Inc., 76 F. Supp. 121, 127 (U. S. D. C. Minn., 1948);

Kerew v. Emerson Radio & Phonograph Corp., 76 F. Supp. 197, 198 (U. S. D. C. N. Y., 1947);

Bauler v. Pressed Steel Car Co., 81 F. Supp. 172, 176 (U. S. D. C. Ill., 1948);

Burke v. Mesta Machine Co., 79 F. Supp. 588, 608 (U. S. D. C. Pa., 1948);

Semeria v. Gatto, 75 N. Y. S. 2d 140 (S. Ct. N. Y., 1947);

General Statement, Section 790.19.

The terms "Agency of the United States" are discussed in Section 790.19 of the "General Statement." In subparagraphs (b) and (c) of said section, it is stated:

"(b) The Portal Act contains no comprehensive definition of 'agency' as used in sections 9 and 10, but an indication of the meaning intended by Congress may be found in section 10. In that section, where the 'agency' whose regulation, order, ruling, approval, interpretation, administrative practice, or enforcement policy may be relied on is confined to 'the agency of the United States' specified in the section, the Act expressly limits the meaning of the term to the official or officials actually vested with final authority under the statutes involved. Similarly, the definitions of 'agency' in other Federal statutes indicate that the term has customarily been restricted in its usage by Congress to the persons vested under the statutes with the real power to act for the Government—those who actually have the power to act as (rather than merely for) the highest administrative authority of the Government establishment. Furthermore, it appears from the statement of the managers on the part of the House, accompany the Conference Committee Report, that the term 'agency' as appearing in the Portal Act was employed in this sense. As there stated (p. 16), the regulations, orders, rulings, approvals, interpretations, administrative practices and enforcement policies relied upon and conformed with *'must be those of an "agency" and not of an individual officer or employee of the agency. Thus, if inspector A tells the employer that the agency interpretation is that the employer is not subject to the [Fair Labor Standards] Act, the employer is not relieved from*

liability, despite his reliance in good faith on such interpretation, unless it is in fact the interpretation of the agency.' Similarly, the chairman of the Senate Judiciary Committee, in explaining the conference agreement to the Senate, made the following statement concerning the 'good faith' defense: 'It will be noted that the relief from liability must be based on a ruling of a Federal agency, and not a minor official thereof. I, therefore, feel that the legitimate interest of labor will be adequately protected under such a provision, since the agency will exercise due care in the issuance of any such ruling.'

"(c) Accordingly, the defense provided by sections 9 and 10 of the Portal Act is restricted to those situations where the employer can show that the regulation, order, ruling, approval, interpretation, administrative practice, or enforcement policy with which he conformed and on which he relied in good faith was actually that of the authority vested with power to issue or adopt regulations, orders, rulings, approvals, interpretations, administrative practices, or enforcement policies of a final nature as the official act or policy of the agency. Statements made by other officials or employees are not regulations, orders, rulings, approvals, interpretations, administrative practices, or enforcement policies of the agency within the meaning of sections 9 and 10."

In *Burke v. Mesta Machine Co.*, *supra*, the court stated (79 F. Supp. at 609):

"The words of Section 9 further strengthen the conclusion drawn from the reports and debates that Congress was referring to rulings by authorized and responsible officials of federal agencies which could be termed rulings of the agency. Not only does the Section refer to 'any administrative regulations, order,

“etc.,” of any agency of the United States,’ but it also goes on to refer to ‘any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged.’

“It seems that Congress acted on the basis of testimony by the Administrator that only he or persons to whom he had specifically delegated the authority to do so were empowered to issue rulings under the Fair Labor Standards Act, and it was with reference to authoritative rulings of this nature that Section 9 speaks. The well settled administrative practice within the Wage and Hour Division is that the Administrator or a Deputy Administrator (subsequently the Solicitor of Labor) to whom the power has been expressly delegated by the Administrator, could issue Interpretative Bulletins, Opinion Letters, Regulations, Rulings or any other of the multitudinous documents making up the administrative literature under the Fair Labor Standards Act.”

The Southern California representative of the Wage and Hour Administrator, upon whose statements the defendant seeks to rely, had no authority nor was it his purpose to make or issue interpretations of the Fair Labor Standards Act of 1938 [R. 298-301]. The defendant consequently may not utilize the unofficial statements of the Southern California representative as a basis for asserting that it failed to pay overtime in good faith reliance on an Administrative ruling.

It is, of course, obvious that the defendant must not only plead good faith but must prove that good faith by more than its self-serving assertions which are denied [R. 298-301].

Burke v. Mesta Machine Co., 79 F. Supp. 588, 612 (U. S. D. C. Pa., 1948).

POINT VII

Defendant May Not Be Relieved of Liability for Liquidated Damages Under the Provisions of Section 11 of the Portal-to-Portal Act.

The Portal-to-Portal Act of 1947 in part provides as follows:

“In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title.”

Act of May 14, 1947, c. 52, §11, 61 Stat. 89; 29 U. S. C. A. §260.

While this statute is not as specific in its requirements as Section 9, it is clear that in order for an employer to bring his acts within the protective scope of the statute he must plead and prove two essential elements, namely: (1) that his act was in good faith; and (2) that he had reasonable grounds for believing that his act was not a violation of the Fair Labor Standards Act of 1938.

It is not enough for an employer merely to make assertions to the effect that he has acted in good faith and that he had reasonable grounds for so acting.

General Statement, Section 790.22.

A defense under Section 11 is not established where an employer asserts reliance on certain favorable rulings when he has knowledge of the existence of contrary rulings.

Glowienke v. Hawaiian Dredging Co., (U. S. D. C. Ill. 1948) 14 Labor Cases, par. 64,343, p. 72,-867.

Defendant cannot in good faith assert reliance on the provisions of Interpretative Bulletin No. 13 when it knew or should have known of the holding of the United States Supreme Court in the *Skidmore* case.

It is, of course, idle to discuss the question of compliance by the defendant with Section 11 on the basis of the bare order of the lower court dismissing the action of plaintiffs. Whether or not the defendant could, to the satisfaction of the court, establish its right to be relieved from liquidated damages is a matter which can only be determined upon a full trial of the case. Good faith is a mixed question of fact and law which may be determined only by objective tests.

General Statement, Section 790.22.

POINT VIII

If Plaintiffs Are Entitled to Recover Under an Express Contract, Application of the Portal-to-Portal Act to Bar Their Claims Would Be Unconstitutional.

In view of the holding of this court in *Potter v. Kaiser Company, Inc.*, (C. C. A. 9, 1949) 16 Labor Cases, par. 64,939, p. 74,990, upholding the constitutionality of the Portal-to-Portal Act of 1949, it is not intended to discuss or argue fully the constitutionality of the statute when applied retroactively. The point is presented here (1) to save the rights of plaintiffs pending a final determination of the question by the United States Supreme Court, and (2) to distinguish the instant case from the *Potter* case, *supra*, on the ground that in the instant case plaintiffs may be entitled to recover upon an express contract irrespective of statute.

1. In summary, plaintiffs contend the Portal-to-Portal Act of 1947 is unconstitutional when applied retroactively for the following reasons:

A.

It takes property of plaintiffs without due process of law in violation of the Fifth Amendment.

Osborn v. Nicholson, 80 U. S. 546, 20 L. ed. 689 (1872);

Forbes Pioneer Boat Line v. Everglades Drainage District, 258 U. S. 338, 66 L. ed. 647 (1922);

Hathorn v. Calf, 2 Wall. 10, 17 L. ed. 776 (1865);

Pacific Mail Steamship v. Joliffe, 2 Wall. 450, 17 L. ed. 805 (1865);

Monongahela Navigation Co. v. United States, 148 U. S. 10, 37 L. ed. 463 (1893);

Coombes v. Getz, 285 U. S. 434, 76 L. ed. 866 (1932);

Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434 (1934);

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593 (1935).

B.

Retroactive application of the Portal-to-Portal Act is an unconstitutional attempt by Congress to exercise the judicial power which is vested in the courts.

United States v. Klein, 13 Wall. 128, 20 L. ed. 519 (1872).

C.

Even though the Portal-to-Portal Act of 1947 may constitutionally be applied retroactively to extinguish claims for portal-to-portal activities, it cannot be so applied to wipe out claims for non-portal activities.

See:

Curtis v. McWilliams Dredging Co., (N. Y. City Court 1948) 14 Labor Cases, par. 64,352, p. 72,890.

2. Section 2 of the Portal-to-Portal Act of 1947 was intended to affect only purely statutory claims, or portal-to-portal activities, not based upon express contract.

Government's Brief as Intervenor, *Potter v. Kaiser Co., Inc.*, (No. 11889, C. C. A. 9, 1949), pages 7 and 8.

See also:

Curtis v. McWilliams Dredging Co., supra;

Sveltik v. Vultee Aircraft Corp., (U. S. D. C. Tex.,
1947) 13 Labor Cases, par. 64,063, p. 71,980.

Conclusion.

It is respectfully submitted that the important and complicated issues raised in the instant cases must be tried by a court and jury, and that it would be most helpful if this Court, in reversing the judgment below, would indicate the correct principles of law to be applied.

Respectfully submitted,

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Nos. 12070-1

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12070.

MYRON L. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,
Defendant-Appellee.

No. 12071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

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Nos. 12070-1

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12070.

MYRON L. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,
Defendant-Appellee.

No. 12071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,
Defendant-Appellee.

REPLY BRIEF OF APPELLEE.

Statement of the Pleadings.

We shall refer to the record in the Glenn case by the letter "R," to that in the Drake case by the letters "D. R."

Upon the application of the appellants, the court dispensed with the printing of the depositions but ordered that they be considered as a part of the record [R. 391]. For the convenience of the court, we have collated in the appendix portions of the depositions to which we shall refer or cite. We shall refer to the appendix by the letters "Ap.," followed by the number of the page where the document or matter referred to is printed. For brevity, in citing portions of a deposition to sustain any statement of fact, we shall do so by reference to the portions of the appendix where the part of the deposition cited is found. Where a deposition is directly referred to or

quoted from, we shall cite the number of the page and line of the particular portion of the deposition, also the appendix page where the portion cited or quoted is printed. In quoting from depositions, we will omit, without asterisks, the objections and discussions between counsel.

We shall refer to appellants' brief by the letter "B."

While the record does not disclose the date when the Glenn action was originally commenced, we agree with appellants' statement (B. 2) that it was filed on March 19, 1945. The second amended complaint was filed on June 23, 1945 [R. 7]. The answer is set out R. 17-36. On July 10, 1946, Raymond E. Drake and a number of others filed a separate suit [D. R. 2-6]. The only difference between the complaints in the two cases is that all of the plaintiffs in the Drake case were substation operators, whereas the plaintiffs in the Glenn case embrace other classes of employees as well as substation operators. Hence, we shall hereafter refer only to the pleadings in the Glenn case.

After the effective date of the Portal-to-Portal Act of 1947, hereinafter referred to as the "Portal Act," the court granted the motion of defendant in each case to dismiss for want of jurisdiction of the subject matter of the action, with leave to file an amended complaint [R. 99-100; D. R. 34-36], and the plaintiffs in both cases filed amended complaints (that in the Glenn case, being the third amended complaint, is hereafter referred to as "complaint"). It was alleged that the plaintiffs were employed under an express oral and written agreement that they were to be paid a stipulated monthly salary based on forty hours of work each week, and were to receive in addition thereto time and a half for hours worked in excess of forty per week; that each of the plaintiffs worked in

excess of forty hours per week without receiving such compensation [R. 107-8]. The second cause of action alleged that the overtime sued for was compensable under custom and practice [R. 111].

As stated by appellants, the answer to the complaint [R. 131-172] denied the material allegations of the complaint. Paragraph III of the answer set out in detail the duties and contracts of employment with the various classes of plaintiff employees [R. 137-149]. Succinctly, the answer alleged, in substance, that the employment of the various employees other than primary servicemen required them to live upon the defendant's premises for five days a week, and during those five days to remain close enough to the station or residence to be able to hear the alarm bell and respond to an emergency occurring during what is designated in the answer as the nighttime hours.* It was specifically alleged that there was no contract, custom or practice to pay appellants for the overtime for which they seek compensation [R. 154-5]. By the term "on call" or "standby" time as used throughout this brief, we shall be deemed to refer to the sixteen hours of time for which the appellants seek recovery in this action, and which generally can be said to be represented by the time between the last required call to the switching center in the afternoon or evening and the first required call in the morning, appellants claiming that between the first call in the morning and the last call in the afternoon they were on a definite eight-hour shift, the excess over eight hours representing their lunch hour.

*The headgate tenders were not required to live upon the defendant's premises, but were required to live within 15 to 20 minutes' walking time of their head works five days a week, and when not engaged in active duties to remain close enough to their residence to respond to an emergency call [R. 241].

Statement of the Questions Involved and the Manner in Which They Were Raised.

Prior to the filing of defendant's answer to the third amended complaint, plaintiffs filed a motion for partial summary judgment [R. 112]. Defendant countered with a motion for summary judgment as to all plaintiffs [R. 219-220]. The court reached the conclusion that there was no genuine issue as to any material fact; that the activities for which each plaintiff sought overtime compensation were engaged in prior to the effective date of the Portal Act, and had not been made compensable by contract, custom or practice "during the portion of the day when such activities were engaged in," and that the defendant would be entitled to summary judgment except that the facts which would warrant summary judgment divested the court of jurisdiction of the subject-matter of the action [R. 330]. Its judgment of dismissal was based solely upon that ground [R. 333].

If it is held that the court was without such jurisdiction, the judgment of dismissal must be affirmed. If this Court should hold that the record discloses jurisdiction, it must then consider the question whether the affirmative defenses of good faith have been established as a matter of law.

We shall present each question under a separate heading.

All italics throughout this brief and the appendix will be ours unless otherwise noted.

Statement or Abstract of Facts.

The record before this Court and upon which the District Court based its conclusion that it was without jurisdiction of the subject matter of these suits, shows the following facts:

PRIMARY SERVICE MEN.

The primary servicemen were employed for a definite eight-hour shift for five days a week. The defendant contends that at the end of the shift they were at liberty to go where they pleased, except that during certain nights of the week they were required, if they did not return home or, returning to their homes subsequently left them, to leave a telephone number where they could be reached in the event their services were needed in an emergency [R. 46, 53, 96-97, 137-8, 224-227]. Two of the four primary servicemen whose depositions have been taken admitted that such was the situation [Ap. 21-22, 24, 28]. The two others contend, however, that they were required during certain days of the week to remain at their homes for the purpose of receiving telephone calls in the event of an emergency [R. 138, 228, 307, 319]. At Santa Paula the primary servicemen's names were listed in the telephone directory [R. 138, 228, 308, 319].

All primary servicemen were paid a monthly salary, which was the only compensation which they received unless they were called out between shifts for an emergency, in which event they were paid time and a half [R. 46, 138-139, 227-228, 295-296, 309, 320; Ap. 16-17, 19, 20-21, 23-25, 28, 31]. All primary servicemen made out their own time cards and never showed on those time cards any overtime except when actually called upon for emergency work between shifts. [R. 46, 97, 151-152, 224,

229; Ap. 17, 23, 28-29, 31-32]. No payments were ever asked for or made to them for leaving their telephone numbers, or for being required to stay in their residences even if it be assumed that such requirement was so imposed upon any of them [R. 138-139, 224-225, 228-229, 295-296, 309-310, 319-320, 321; Ap. 16-17, 19, 23, 25, 29, 31-32, 33].

SUBSTATION OPERATORS AND ATTENDANTS.

Substation operators lived in a company house near their substation and for five days a week were required to remain in such proximity to their residence or station that they could hear an alarm bell in case their services were needed for an emergency [R. 50-51, 113-114, 140, 178-180, 195-196, 200-201, 304-305, 323; D. R. 95; Ap. 44, 60, 69].

There was a specified hour for making the first and last calls and certain other calls to the switching center, which varied at the different stations. The time for the first call usually was from 7:30 or 8:00 A. M. and the time for the last call 4:30 or 5:00 P. M. [R. 50, 140, 182; Ap. 39, 47, 51, 63]. Defendant contends that except for such calls and street light switching at some stations, there was no definite time at which they were required to perform any active services, but both parties contemplated their being performed during the daytime [R. 50, 97, 140, 182, 205; Ap. 40, 44, 59, 72]. Appellants contend that they had a definite eight-hour shift during which they were expected to be at or near their substations [R. 305, 322-323; Ap. 43, 44, 48, 59, 63, 73, 77]. Their families lived with them and when they were not performing any active duties they could employ their time in any way they saw fit, provided they did not go so far from the station

or their residence as not to be within hearing of the alarm [R. 140, 178, 196, 200-201; Ap. 38, 45, 51-52, 62-63, 73, 75]. They were paid a monthly salary and no other compensation, unless they performed some active service during what was designated in the answer and will be hereinafter referred to as "nighttime hours," which subsequent to December 24, 1943, was between 6:00 P. M. and 8:00 A. M., and prior to that between 10:00 P. M. and 8:00 A. M. Active duties performed in the nighttime hours have been designated in the answer and will be referred to herein as "emergency services." For any such emergency services they received time and a half [R. 50, 119, 141, 180, 181, 183-184, 201-202, 204, 305, 318, 321-323; Ap. 34, 36, 42, 45-46, 49-50, 59, 66, 69, 74, 78, 79]. They each made out their own time cards and notwithstanding the fact that they did not always take eight hours to perform their active services, they always showed eight hours of work, neither more nor less, and never showed overtime except for emergency services performed during said nighttime hours, for which they were paid time and a half for all time so reported [R. 44, 182-183, 204-206, 304-305, 322; D. R. 125, 127-128, 137-138, 140; Ap. 36-37, 41-42, 51, 54, 63-64, 67, 70-71, 74, 79].*

Each and all of the foregoing facts are equally applicable to relief operators, except that as they relieved the regular operators at various stations for two days a week, they traveled from station to station and therefore did not have their families, if any, with them [R. 95, 120, 142, 176, 200-201, 322].

*A photostatic copy of each of the time sheets, attached to Ellingford's deposition as examples, is reproduced for the convenience of the Court on pages 55, 56 and 57 of the Appendix.

HYDRO STATION ATTENDANTS AND APPRENTICE ATTENDANTS.

Although their specific duties were somewhat different [R. 48-49, 233, 312-313], the nature of employment of the hydro station operators and apprentice operators was in all respects similar to that of the substation operators [R. 48-9, 144-6, 231-240, 312-3, 315]. Normally their first call in the morning would be made not later than 8:00 and the last scheduled call not later than 4:30 or 5:00 in the afternoon [R. 234-5].

Each employee made out his own time report and always reported eight hours, regardless of whether he performed that amount of active service or not [R. 45, 146-147, 222, 235-236, 239, 311; Ap. 86-87, 95]. He was paid a monthly salary, and while his method of reporting overtime was somewhat different from that employed by the substation operators, the substance and effect of it was that any emergency services performed during nighttime hours, which as to hydro employees were between 4:30 P. M. and 7:30 A. M., were reported as overtime, for which he was paid time and a half [R. 45-6, 146-8, 222-4, 235-8, 239-240, 311-3, Ap. 83, 85, 92-94, 95-96].

Starting May 1, 1943, for those employed at Kern Hydro Station No. 1 such overtime was paid for any services reported in excess of eight hours per day, even though the weekly report did not show more than forty hours per week. Such practice was extended from station to station until applicable to all of them on or about October 1, 1945 [R. 147, 237].

HEADGATE TENDERS.

Each and all of the facts stated with reference to the employment of the hydro station attendants is equally applicable to the headgate tenders [R. 45, 46, 50, 51, 143, 144, 241, 244, 323, 324; Ap. 102, 103, 104-6, 108-9, 112-114].

COMPUTATION OF OVERTIME RATE.

In determining the amount of overtime payable to any resident employee for emergency services performed during the nighttime hours, the defendant, with the knowledge of all of the employees, computed the hourly rate on the basis that the monthly salary was paid for forty hours of work per week [R. 107, 108, 119; Ap. 50, 53-54, 70-71, 76-78, 87].

The only dispute shown is as to the time which the resident employees consumed in performing their active duties, the defendant claiming that it was always much less than eight hours per day or forty hours per week, and in the case of the substation operators it usually did not take more than two to five hours per day [R. 180, 182, 187, 189, 233-4, 241, 139-40, 143-4, 145]. Appellants, on the other hand, claim that they had a definite eight hour shift during which they were required to be on or near their various stations, even though they were not actively engaged during the whole of such time, and that they were on call during the other sixteen hours of the day [R. 303, 305, 322-323; Ap. 43, 44, 48, 59, 63, 73, 77, 81, 82, 89-90, 104, 112-113]. They further contend that their monthly salary was paid to them for their eight hour shift, and that the only overtime they received was for emergency services performed during the nighttime hours; hence, they were entitled to recover for their waiting or standby time [R. 107, 108, 119, 305; Ap. 36, 45-46, 50, 66, 78-79, 93-94, 95-96, 104-105, 114].

Summary of Argument.

I.

The record not only fails to disclose that there was any express provision of a contract, custom or practice to pay appellants for their "on call" or "standby" time for which they seek recovery, but on the contrary, it affirmatively appears without contradiction that the contract, custom and practice was precisely to the contrary; that none of the appellants were ever paid anything for so-called standby time, and that none of them reported it because they knew it was the custom and practice of the defendant not to pay for it. Hence, under Section 2 of the Portal Act, the Court was without jurisdiction of the subject-matter of the actions, and its dismissals of the actions were proper.

II.

In the event that it should be held that the court below had jurisdiction of the suit, it would have been necessary for the District Court to have rendered summary judgment in favor of defendant upon the ground that its affirmative defenses of good faith were established by the record as a matter of law.

While appellants have presented their argument under eight different headings, the two points above outlined constitute a complete answer to every contention advanced by them.

ARGUMENT.

I.

The District Court Correctly Held It Was Without Jurisdiction of the Subject-Matter of the Actions and Properly Dismissed the Cases Upon That Ground.

Appellants' position is at least paradoxical. Citing *Kennedy v. Silas Mason Co.*, 334 U. S. 249, and *Twigg v. Yale etc. Co.*, 7 F. R. D. 488 (B. 22), their principal contention seems to be that a summary judgment should not be granted where the factual situation is complex and controversial. We concede that it should not be granted where the record is controversial as to any material fact. However, in the instant case, unlike the situation in the cases cited by plaintiff, there is no dispute on any issue of fact material to the question of the court's jurisdiction.

However, while arguing that, because of the dispute they claim exists as to the facts and the complicated issues of law, the cases should be remanded for a trial upon the merits, appellants apparently feel that the record is sufficiently clear both as to the fact and law so that on remanding the case for a retrial this Court should be able to and should decide the result of that trial.

As stated by the appellants, it is to be "noted that the District Court did not grant summary judgment, *but dismissed the actions on its own motions*" [B. 20; R. 333; D. R. 105]. It is, of course, axiomatic that Federal Courts, being of limited jurisdiction, can not proceed unless the record at all times discloses their jurisdiction

of the subject-matter, and that when its lack of jurisdiction affirmatively appears, it is the duty of the court to dismiss the case whether or not the point has been raised by either party.*

At the outset it may be noted that the complaint (third amended in the *Glenn* case and second amended in the *Drake* case) did not state facts sufficient to show jurisdiction, the allegations simply being that the plaintiffs were employed to perform forty hours of service per week at a monthly salary "based on forty hours of work each week," and were to receive time and a half for all hours worked in excess of forty hours per week [R. 107-8]. The insufficiency of the complaint lies in the fact that the Portal Act required an *express* provision of a contract making the particular activities sued for compensable, or else that they be made so by custom and practice. An agreement of the character alleged does not specify what activities it was agreed should be paid for or were by custom and practice made compensable. In the appendix, pages 129-137, we have digested the numerous decisions that have considered allegations or proof of the same character as in the complaint and held them insufficient. The court below, however, based its decision that it was without jurisdiction upon the entire record. Hence, we shall address ourselves to the record, contenting ourselves as to the insufficiency of the complaint with calling the court's attention to it, and the supporting cases to be found in the appendix. However, by not again referring to the insufficiency of the pleading we do not wish to be understood as waiving that defect.

*See *post*, pp. 52 to 57, and Appendix, pp. 124 to 125, where cases on this point are collated.

As we read appellants' brief, they contend that the judgment of dismissal should be reversed for three reasons:

(1) That the plaintiffs had a right of recovery under the Fair Labor Standards Act (hereinafter referred to as the act or the original act) and that such right was unaffected by the Portal Act.

(2) That there was an express contract to pay them for such standby time.

(3) That there was a custom and practice to pay them for such standby time.

We shall reply separately to each contention combining however under one subheading our reply to contentions two and three.

(1) PLAINTIFFS' CONTENTION THAT THE RIGHT OF RECOVERY WHICH THEY CLAIM THEY HAD UNDER THE ORIGINAL ACT IS UNAFFECTED BY THE PORTAL ACT IS WHOLLY WITHOUT MERIT.

The main part of the plaintiffs' argument is that under the Act prior to its amendment the plaintiffs were entitled to recover. This we do not concede. If the evidence sustained the denials and averments of the answers, judgments would have had to be for defendant. But the question presented by this appeal is not whether plaintiffs could or could not have prevailed under the original act, *but whether in view of the Portal Act the District Court had jurisdiction of the subject-matter of the actions.*

As shown by our preceding statement, there are four classes of employees involved: (1) primary servicemen; (2) substation operators; (3) hydro station operators, and (4) head-gate tenders. The last three classes of em-

ployees may be designated generally as “resident employees,” and as the employment of all three presents the same questions as to the court’s jurisdiction, they can be considered together.

The employment of the primary servicemen was entirely different and may be summarily disposed of.

PRIMARY SERVICEMEN.

As noted, the primary servicemen were employed on a definite eight hour shift. It is clear that merely being required to leave their telephone numbers where they could be reached, even before the amendment to the Act, was not an employment restraint entitling them to overtime. [See Ap. pp. 138 to 141, where the cases sustaining this rule are collated]

Plaintiffs claim (and although the defendant disputes it we concede that for the purposes of this appeal the plaintiffs’ claim must be accepted as correct) that certain of the primary servicemen were required on certain days of the week to remain at their homes to receive telephone calls but were only paid overtime for actual services performed in answer to an emergency call between shifts. If it were to be conceded that summary judgment could not have been granted before the Portal Act as to these primary servicemen on the theory that if their claims were sustained by the evidence that their detention at their homes constituted on call time under the decisions in *Armour & Company v. Wantock, et al.*, 323 U. S. 126, and *Skidmore v. Swift & Company, supra*, 323 U. S. 134 (hereinafter referred to as “*Armour*” and “*Skidmore*” cases). It was the clear intent of the Portal Act to prevent a recovery for any activities, including on call time of the character herein discussed, unless such services were

made compensable by an express provision of a contract or by a custom or practice.

The contention of the appellants that the Portal Act was aimed only at the *Mount Clemens* case and was not intended to bar recovery for the standby time of all of the various classes of employees involved in this litigation is entirely untenable.

Both the congressional debates and the wording of the Act show a clear intent upon the part of Congress to prohibit recovery of overtime for *any* activity which was not made compensable by express provision of a contract, or by custom or practice.

Senator Barkley in opposing the bill, in a debate on March 21st, 1947, said in part:

“‘It is necessary to go from the section which undertakes to define portal-to-portal back to section 2 to find out what the authors are talking about; and when we get back to section 2 we find that portal-to-portal *means anything which is not covered by contract or by custom or practice.*’ (Congressional Record, Vol. 93, pages 2428, 2429.)”

See Ap. pp. 1 to 14 where the Congressional discussions on this subject are collated.

Part I, Section 1, of the bill declares:

“The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, *thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation*, upon employers with the results that, if said Act as so interpreted or claims arising under such in-

terpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) *employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay;*"

Portal-to-Portal Act of 1947, Part I, Sec. 1.

That a recovery by appellants in this case would constitute windfall payments, both immense in amount and retroactive in operation can not be denied. The original suit was not filed until after the *Armour* and *Skidmore* decisions, evidencing that prior to those decisions none of the defendant's employees had the slightest thought of claiming additional compensation.

It appears from the depositions of the appellant primary servicemen that their monthly salaries were between \$220.00 and \$225.00 [Ap. 16, 25, 28, 31], in addition to which they had been paid time and a half for any emergency services between shifts, their hourly rate computed on their salary being paid for their eight hour shift. None of them had ever reported as overtime any time spent between shifts, either while they were

waiting or being available at their own homes or elsewhere, to answer telephone calls. Their present theory is that while their salary of \$225.00 per month was adequate compensation for the services performed during their eight hour shift, that in addition to that salary, for merely being available between shifts to answer a telephone call, they are entitled to additional compensation, as overtime for 16 hours, or three times the amount of their salary or \$675.00 per month, or a total monthly compensation of \$900.00 per month, one-fourth of which was paid for services requiring physical exertion and skill, and three-fourths for merely being available in case their services were required for an emergency. That such payments would not only be fantastic and unjust but windfall compensation, as that term was understood by Congress, can not be gainsaid.

Section 2 of the Act, dealing with existing claims, reads:

“(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of *any activity* of an employee engaged in prior to the date of the enactment of this Act, *except* an activity which was compensable by either—

“(1) an *express provision* of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

“(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

“(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice *only when it was engaged in during the portion of the day with respect to which it was so made compensable.*

“(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

“(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, *shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.*”

Portal-to-Portal Act of 1947, Part II, Sec. 2, p. 3.

Broader and more comprehensive language could not have been employed by Congress. Clearly the Act was not passed to deal merely with Portal-to-Portal activities, but with any activity which had not been made compensable by contract, custom or practice in the particular plant.*

The record is clear and undisputed that the primary servicemen were not paid anything, and understood they were not to be paid anything, for either being required to leave their telephone numbers where they could be reached, or for being required to remain in their homes to take telephone calls, if they were so required.**

It is to be noted that the appellants do not discuss the primary service men at all, but only the resident employees.

RESIDENT EMPLOYEES.

It must be conceded that prior to the Portal Act the District Court had jurisdiction of the subject-matter of the action. But, notwithstanding that it was held by the Supreme Court in the *Skidmore* and *Armour* cases that the employee firemen in those cases were entitled to eight hours of standby time, we have always felt that the factual situations in the *Skidmore* and *Armour* cases and *Johnson v. Dierks Lumber & Coal Co.* (C. C. A. 8), 130 F. 2d 115, 120, cited by plaintiffs (B. 25) were so dissimilar from those of the instant cases as to have no controlling effect on appellants' right of recovery even under the original act.

*See Appendix, pages 126 to 128, where cases on this point are collated.

**See *post*, pages 44 to 45, where the testimony of the primary servicemen on this point is set out.

Notwithstanding the claims of the resident employee appellants that they had a definite eight hour shift, we believe we could have convinced any reasonable court or jury that the time in which it took them to perform their active duties between their first and last calls to the switching centers was much less than eight hours per day. Indeed, an examination of the summary of the logs of the sub-station men which were introduced at the pre-trial hearing on November 18, 1946 [Deft. Exs. B-1 to S-6] show that on the basis of time estimated by Mr. Lyons in his testimony [D. R. 117, 127], which is uncontroverted, the time required for their active duties about the sub-station would average between $1\frac{1}{2}$ and 2 hours per day [Ap. pp. 115 to 120]. It is true that in addition to that they were required to take care of their yards and station grounds, but it may be doubted whether that time should be computed under the Act. Even if it should, it only consumed a short time each day.

While in the depositions the appellants complain of the strain of answering call-outs, the exhibits, U to CJ, introduced at the said pre-trial hearing show all recorded call-outs of the resident employee appellants and that as to each such appellant there were a number of months in which there were no call-outs at all, and that the call-outs of all resident appellants averaged one in 15.5538 days.

While there has never been any dispute that when not engaged in active duties they were required to remain in hearing of the alarm for five days a week, there is no question but that when not occupied in some duty in the station they were free to be in their own homes with their families and to engage in any personal activity which they saw fit which did not take them beyond the hearing of the alarm bell. Indeed, Ellingford's deposition shows that he solicited the job so as to be able during the day-

time to care for his sick wife [Ap. 52-53]. In short, before the Portal Act, we were always confident that on a trial on the merits we could show a factual situation from which a court or jury could reasonably conclude that when not employed in active duty, the appellants were not engaged to wait, *but were waiting to be engaged*. If the court and jury had reached this conclusion we think there is no question but that judgment should have been for defendant. In the *Skidmore* case it is said:

“Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.”

* * * * *

“The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations. *In some occupations, it says, periods of inactivity are not properly counted as working time even though the employee is subject to call.*”

* * * * *

“In general, the answer depends ‘upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work.’”

Skidmore v. Swift & Co., 323 U. S. 134, 136, 138.

For similar decisions announcing that in the situation of the instant case where it is difficult to ascertain the actual amount of time which an employee gives to his

service, any reasonable agreement between the employer and employee will be followed and sustained by the court, see Ap. pp. 143 to 146.

We have briefly sketched the basis for our defense under the Act before its amendment in reply to the arguments of appellants that they were clearly entitled to recover under the Act. However, as we have repeatedly pointed out, the question presented to the court by these appeals is not whether either party could have prevailed under the original act, *but whether after the effective date of the Portal Act the District Court had jurisdiction of the subject-matter of these actions.*

Further, even if we were to assume that the terms of employment of appellants contravened the Act, it cannot be denied that the express purpose of the Portal Act was to validate employment arrangements that were invalid under the judicial interpretation which had been accorded to the original Act and to relieve employers from liability in situations similar to that of the instant case.

As stated by the Fourth Circuit Court of Appeals:

“Looked at in another way, all that Congress has done by the legislation here under consideration is to validate the contracts and agreements between employer and employee *which were invalid under the Fair Labor Standards Act by reason of the interpretation placed by the Supreme Court upon that act*; and the authority of the legislative body to validate voluntary transactions which at the time they were entered into were by statute invalid or illegal has been repeatedly upheld. (Citing cases.) In other words, the contracts of employment which contemplated that no payment should be made for the portal to portal activities but that these were to be compen-

sated by the agreed wage, were invalid only because of the provisions of the Fair Labor Standards Act. *There was nothing in law or in reason which forbade Congress to give validity to these contracts retroactively, just as the invalid pledge of securities by National Bankruptcy Associations was validated by retroactive legislation in the case of McNair v. Knott, supra.*"

Seese v. Bethlehem Steel Co., 168 F. 2d 58, 64.*

The Fourth Circuit Court of Appeals in *Atallah v. B. H. Hubbert & Sons, Inc.*, 168 F. 2d 939, cited and followed the above case, and certiorari was denied under the name of *Cingrigrani v. B. H. Hubbert & Sons, Inc.*, 335 U. S. 868.

The reasoning upon which the Supreme Court based its decision in *Tennessee C. I. & R. Co. v. Muscoda Local 123*, 321 U. S. 590, logically led step by step through the *Armour* and *Skidmore* decisions and *Jewell Ridge Coal Corporation v. Local 6167*, 325 U. S. 160, to what the appellants state to be the "most sensational result in *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 90 L. Ed. 1515 (1946)."

As we have shown, it is crystal clear, both from the congressional debates and from the language of the Act, that it was the intent of Congress by the Portal Act to wipe out the right of recovery for any services or activities which had not customarily been paid for by the employer or for which he had not contracted to pay. The contention which appellants here advance that the Portal Act was

*See Appendix, page 142, where similar cases are collated.

**Herein referred to as the "*Mt. Clemens case*" or "decision."

limited to portal activities has been rejected, so far as we have been advised, by every court to which it has been presented.

See Appendix, pages 126 to 128, where the decisions are collated and Appendix, pages 1 to 14, where the excerpts from the congressional debates on the subject are collated.

Appellants cite and greatly rely on *Conwell v. Central Missouri Telephone Co.* (D. C. Mo.), 76 Fed. Supp. 398, and the affirmance of the decision of the District Court in *Central Missouri Telephone Co. v. Conwell* (C. C. A. 8), 170 F. 2d 641, quoting at some length from the latter decision. Any careful reading of either decision will show that the factual situation was substantially dissimilar from that in the instant cases.

The suit was by switchboard operators who were required to be on active duty at the defendant's switchboard for eleven hours a day and were paid for only eight. The switchboard was in the defendant's telephone building and the operators were not permitted to leave the room in which it was located during the eleven hours of service. However, a cot was placed in the room. The plaintiffs were paid only for eight hours, three of the eleven hours on duty being deducted as theoretical sleeping time. When plaintiffs demanded an increase of wages, the defendant simply shortened the theoretical sleeping time. The District Court rendered judgment for the plaintiffs. The Court of Appeals affirmed. Both decisions were predicated upon the theory that the plaintiffs in that case were not performing standby time but were directly engaged for eleven steady hours of active employment. In other words, as we read the decisions, neither the District nor the Appellate Court assumed that there

had been any actual sleeping time. As a matter of fact, the opinions of both courts indicate that the placing of the cots in the room was merely for the purpose of avoiding payment for more than eight hours of the continuous eleven hours the plaintiffs were required to be in constant attendance upon the switchboard. The Appellate Court said, in part:

“We conclude that plaintiffs were on duty, performing compensable activities, during the entire eleven hours they spent at defendant’s exchanges during the period involved in this action.”

Central Missouri Tel. Co. v. Conwell (C. C. A. 8),
170 F. 2d 641, 646.

The District Court thus specifically distinguished the factual situation of that case from the instant cases:

“ . . . If an operator is employed in her home, she may, when not engaged in operating the switchboard, go about the duties of her home, looking after the wants and needs of her family. That she certainly cannot do if she is away from her home, conducting the affairs of her employer in its own business office where she is subject to continuous call to duty wherever the patrons of her employer demand service.

* * * * *

“ . . . Defendant has cited cases in which the courts have held that certain types of employees who were *standing by* waiting to be called to perform some duty were not in compensatory service. *In all of those cases, however, such persons were compensated for such service as they actually rendered to the employer over and above their regular duty; that is, when a fireman who may have slept upon the*

premises ready for call was actually called out, he was compensated for that time." (Italics in first instance the court's.)

Conwell v. Central Missouri Telephone Co. (D. C. Mo.), 76 Fed. Supp. 398, 405, 406.

Clearly, the instant cases fall within the distinction above pointed out. Here, each resident employee when not engaged in any active duty could be with his family in his home and indulge in any personal pursuit he desired which did not carry him beyond hearing of the alarm bell.

It seems to us clear that under the *Conwell* case and the theory upon which the decisions were rendered, it must be held that in the instant cases the standby time of the appellants was rendered non-compensable by the Portal Act.

The decision by the Court of Appeals in the *Conwell* case is cited on page 28 of appellants' brief to sustain the proposition that the Portal Act was meant to apply only to portal activities. It does not by any stretch of the imagination announce any such holding. It equally fails to sustain the further proposition for which it is cited (B. 38) that the standby time in the instant cases was compensable under custom or contract.

We think there is no need of commenting on the other cases cited by appellants. None of them are as factually close as the *Conwell* case, and all of them are subject to the same, and even greater distinctions.

That the Act was intended to cover precisely the instant cases is made clear by the debate in the House on the report of the Conference Bill which both Houses adopted:

“Mr. Hinshaw. The gentleman remembers the cases known as the stand-by cases which were brought out before his committee in which certain employees might be called upon at some time not during their regular working time to perform some duty and that many suits for wages have been instituted under that type of claim. Is that provided for in the present bill?

“Mr. Walter. Yes; we feel that under the language of section 2(b) of this bill that type of arrangement is covered and that the employer is not liable.

“Mr. Hinshaw. *The case I had in mind was one where there were certain persons who were left to guard electrical distribution stations where they were given a house and so forth and perhaps performed one or two labors per day and yet were paid on a monthly basis. Large suits were brought for time and a half for an additional 8 hours per day pursuant to the ruling of the court.*

“Mr. Walter. We hope that we have met that situation and all of the situations that have been brought to our attention, because we had in mind that all of these portal-to-portal suits are in the nature of windfalls. *None of the plaintiffs—and I say that advisedly—ever felt they were entitled to compensation for activities which are the basis of these suits.*”
93 Cong. Rec. 4515 (May 1, 1947).

The judgments of dismissal must then be affirmed unless there is some evidence in the record to sustain the contentions of the appellants' standby time was made compensable by the *express provisions* of a contract or by practice or custom.

(2) THE RECORD DOES NOT SHOW THAT THE STANDBY TIME OF THE APPELLANTS WAS MADE COMPENSABLE BY THE EXPRESS PROVISIONS OF A CONTRACT, OR BY CUSTOM OR PRACTICE. ON THE CONTRARY, IT APPEARS WITHOUT CONTROVERSY THAT THE AGREEMENT, CUSTOM AND PRACTICE WERE THE DIRECT OPPOSITE.

According to the answers of plaintiffs to defendant's interrogatories, the contract on which they rely consisted of Operating Order A-36* (partially set out by appellants, B. 10-11), the hiring of the men, and custom, practice, and representations [see Interrogatory 16, R. 262; Answer, R. 320; Interrogatories 43-46, R. 269; Answers, R. 322; Interrogatories 82-85, R. 276; Answers, R. 312-314; Interrogatories 111-115, R. 281-2; Answers, R. 324].

It is to be noted that the appellants claim their contract was partly oral and partly written, and that the only written portion is the bulletin, A-36.

The bulletin for 1942 was introduced as Plaintiffs' Exhibit 1, and as revised in 1943 as Plaintiffs' Exhibit 2 [R. 171].

A-36 1942 provided:

"(2) *Station attendants* have no regular scheduled working hours and are subject to call twenty-four hours per day on each day worked. *Forty hours shall constitute a work-week.*

*Hereafter sometimes referred to as "bulletin."

* * * * *

“7. *Overtime.*

A. The payment of overtime shall be on the basis of one and one-half times the average annual hourly rate of pay for overtime work. The average annual hourly rate shall be calculated by multiplying the employee's monthly rate of pay by 12 and dividing by the quantity of 52×40 . Fractions of less than one-half cent should be disregarded and fractions of one-half cent and over raised to the next full cent before multiplying by one and one-half.”

The revision of January 1, 1943, partially referred to by appellants (B. 10-11), contained these same provisions, except that station attendants were included in the category of “week period employees.”

So far as we are advised, it has been held by every court which has passed upon the question that a general statement such as contained in Bulletin A-36 or a provision to the same effect in a contract of employment that the employee will be paid a specific hourly rate or an agreed weekly or monthly salary and time and a half work in excess of forty hours a week does not meet the requirements of the Portal Act, in that such promise or contract provision does not specify the activities that are compensable; and that under the Portal Act there must be an express promise to pay *for the particular activities for which compensation is sought* or else a custom or practice to pay for those particular activities. [See cases digested Ap. pp. 129 to 137.]

Appellants assert (B. 31-3) that this Court had before it in *Joshua Hendy Corp. v. Mills*, 169 F. 2d 898, a contract substantially similar to that alleged here as being set out in Bulletin A-36. This is entirely erroneous. An ex-

amination of that case will show that waiting or standby time was not involved; that the contract in that case was a definite written one between the union and the appellants, and was in no wise similar to the bulletin.

Lewellen v. Hardy-Burlingham Min. Co. (D. C. Ky.), 73 Fed. Supp. 63, from which appellants quote, is even farther afield. According to the opinion, there was no standby time at all involved, the Court finding that the plaintiff had performed services in excess of forty hours per week for which he had not been paid. There is no suggestion in the opinion that the services were rendered non-compensable by the Portal Act. Indeed, that Act apparently was not relied on as a defense and was not referred to in the opinion.

Appellants argue that the bulletin constituted a direct promise to pay overtime for all time spent upon defendant's premises in excess of forty hours per week. It is clear that no such interpretation can be reasonably drawn from the language of the bulletin. As we have pointed out, before the *Armour* and *Skidmore* cases, standby time had not been regarded by management or labor as compensable, as such, and Congress so found in its study prior to the passage of the Portal Act. We again call attention to the debate on the Conference Report between Mr. Hinshaw and Mr. Walters heretofore set out wherein Mr. Hinshaw asked Mr. Walters if recovery in the precise situation presented by the instant cases had been barred by the Act and Mr. Walters replied:

"We hope we have met that situation and all situations that have been brought to our attention.
* * * None of the plaintiffs—and I say that ad-

visedly—ever felt they were entitled to compensation for activities which are the basis of these suits.” (93 Cong. Rec. 4515 (May 1, 1947).)

Indeed, Interpretative Bulletin 13 issued by the Administrator [R. 158-160] which, as we read appellants’ brief, they concede the defendant had a right to rely on before the *Armour* and *Skidmore* cases, in effect stated that as to situations such as presented by the instant cases, the on-call or waiting time was not compensable.

Hence, we say that neither the 1942 nor the 1943 revision of Bulletin A-36, both of which were issued long before the *Armour* and *Skidmore* decisions, could be reasonably interpreted as even suggesting, much less promising, compensation for standby time.

Most appropriate are the observations of the District Court of Minnesota in *Plummer v. Minn. etc. Co.*, 76 Fed. Supp. 745, where the plaintiffs claimed that their preliminary and postliminary activities were made compensable by a direct contract of employment wherein they were told they would be paid so many cents per hour for all work performed. In granting summary judgment for the defendant, the court, in part, said:

“ . . . Clearly, such a showing, in view of the type of activities alleged to have been performed, would not sustain recovery under the Act. *It is conceded that the parties did not agree in the employment contract that the services enumerated were to be compensable* . . . The claimed basis for their recovery herein as indicated by this showing is the very situation which apparently motivated Congress in passing the legislation now commonly referred to as the Portal-to-Portal Act. *It seems elementary that*

the conditions of that Act are not met by the implied contract claimed to be based on the general employment contract which is set forth in plaintiffs' affidavit."

Plummer v. Minn. etc. Co. (Minn.), 76 Fed. Supp. 745, 746.

There is another legal principle which, independent of other considerations, would prevent such construction. It is well settled that when there are two possible constructions of a written instrument, one of which will lead to fair and equitable results and the other to absurd and inequitable results, the former will be accepted.*

We have already shown the absurd result the contention of appellants would lead to so far as the primary servicemen are concerned. The appellants' interpretation of the bulletin as to the resident employees is only slightly less fantastic and absurd, and that because of the fact that being less skilled, they receive less monthly compensation.

The salaries paid to the various resident employees as shown on Exhibits B-1 to S-6, inclusive, ranged from \$135.00 to \$200.00 per month. We believe that as to substation operators, the average would be somewhere between \$175.00 and \$180.00 per month, and between \$5.00 and \$10.00 less per month for the hydro operators. Mr. Ellingford, a substation operator, testified his salary was \$180.00 per month [Ap. 53]. Using his rate of compensation as an example, the construction which appellants place upon the contract would mean that the defendant agreed to pay Ellingford for the services which he

*See Ap. pages 147 to 149, where cases in support of this fundamental rule are collated.

performed \$180.00 per month and, for doing nothing other than remaining on the premises for sixteen hours a day in order to respond to an emergency call, an additional compensation of three times that amount, or \$540.00. However, so far as we are advised, no court has allowed overtime for eating and sleeping even in the case of such a drastic employment restriction as was involved in the *Armour* and *Skidmore* cases. If, therefore, we give the Bulletin A-36 the interpretation appellants contend for but limit it to eight hours of standby time, it would constitute an agreement between Ellingford and the defendant to pay him \$180.00 for his actual services, and \$270.00 per month for not doing anything other than remaining within call so as to be able to respond to an emergency. In other words, for the services which required any effort or skill on Ellingford's part, he was to receive \$180.00 per month, and for doing nothing other than remaining on the premises where he could be with his family and engage in any gainful or other pursuit he desired, he was to be paid \$270.00 per month. The absolute absurdity of such an agreement is apparent without further argument; no management that expected to remain solvent would have made it.

It is, of course, elementary that in interpreting a contract, the conduct of the parties may be considered. In this case, however, there is no need of relying on that rule, since the appellants claim that the contract itself was not wholly written but consisted of the bulletin, the employment, and *custom and practice*. When the conduct of the parties is considered, it is crystal clear that neither party interpreted the bulletin as containing any promise or agreement to pay overtime other than for emergency services performed during the nighttime hours. All of the

resident employees reported eight hours of work regardless of whether they performed that number of hours of active work or not, and reported as overtime only emergency services performed by them during the nighttime hours, for which it is conceded they were paid time and a half. Significant also is the conceded fact that when the War Manpower Commission placed Southern California on a forty-eight hour per week basis, all of the resident employees,—and for that matter all of the primary servicemen,—reported as overtime and were paid for eight hours on the sixth day, and made no further claim for overtime for that day unless they performed some emergency service during the nighttime hours.

It is further uncontroverted that in figuring their overtime, their hourly rate was determined upon the basis that their salary was applicable to forty hours of service per week. The record not only is destitute of a suggestion that the plaintiffs were not cognizant of the method of calculating their overtime pay or that they objected to it, but the contrary affirmatively appears [See Affidavits of Plaintiffs, R. 121].

The testimony of the appellants whose depositions were taken is so significant on this subject that we desire to call it to the attention of the Court:

Eugene L. Ellingford, a substation operator, testified:

“Q. You received a monthly salary? A. I received a monthly salary *that was computed on an hourly basis for eight hours a day.*

Q. Did somebody instruct you as to that computation? A. I don't get what you mean.

Q. Well, as I understand it, at the time you were hired you were informed of a monthly salary of so

many dollars a month? A. *It was stated to me that it was paid on an hourly basis for eight hours a day.* [Ellingford Dep., pp. 13-14, lines 26-9; Ap. 50.]

Vernon B. Wert, a substation operator, in his deposition testified‘

“A. Each one makes out their own daily time sheets.

* * * * *

At the conclusion of five days you would have had in 40 hours. We are now working six days a week, so that means that the sixth day in the week would be an overtime day, and it is so recorded.

Q. In these time reports that you each make out, what is your practice with reference to showing the time or the hours worked? Which is it you show, the hours worked or the time during which you worked? A. *We don't show the times that we worked.*

Q. I mean by the clock, the time shown by the clock? Do you show the time, so to speak, when you go on duty and when you go off duty, or just so many hours worked? A. We put down the date and what we were doing. * * *

Q. *Eight hours?* A. *Yes.*

Q. You put that down regardless of whether you worked more or less than that time, do you? A. Oh, no. *If we work more than eight hours, why, then, we put in for overtime for that.* That goes in a different section of the time sheet.

Q. On the same form? A. On the same form.

Q. *What if you work less than eight hours; what do you do then?* A. *We put in eight hours.* [Wert Dep., pp. 8-10, lines 26-9; Ap. 70-71.]

“Q. In computing the overtime that you were paid—you were paid some overtime; is that correct? A. Yes.

Q. In computing that, was that based upon an 8-hour day, five days a week when you were working five days a week? A. *Based on a 40-hour week, yes.*

Q. *It was based on a 40-hour week?* A. *Yes.”* [Wert Dep., p. 41, lines 19-26; Ap. 77-78.]

M. E. Roach, a hydro station attendant, in his deposition testified:

“Q. I know; but your actual active work—let’s leave aside standby time—was until noon, and then later it was changed? A. Yes.

Q. *In that time, no matter what it was, you just put eight hours in there?* A. *Yes.”* [Roach Dep., p. 26, lines 20-26; Ap. 87.]

“Q. What did they pay overtime for? A. For the time that you were called out.

Q. After normal hours? A. After 4:30 in the evening, or before 7:30 in the morning.” [Roach Dep., p. 12, lines 11-15; Ap. 83.]

Rogers, hydro-station attendant—

“Q. When you came to take it, what, if anything, was said about it that you remember; the substance of what he said about the job? A. Well, he told me that I would work a regular eight-hour day, but I would be stuck there 24 hours a day.

Q. What did he say, if anything, about overtime? A. *We would get overtime if I was called out after 4:30.”* [Rogers’ Dep., p. 25, lines 8-15; Ap. 93.]

See, also, for similar testimony of other appellants whose depositions were taken, Appendix pp. 36, 42, 53-54, 66, 76-77, 94, 96.

As noted, appellants state that part of their oral contract consisted of the actual hiring and custom and practice. The affidavits of Mr. Short and Mr. Garrison, who did the hiring, are in the record [191-203]. Each states that he impressed upon each applicant that he had to remain within hearing distance of the bell for twenty-four hours a day [R. 195, 200, 201]; that he would receive a designated salary and time and a half for emergency services during the so-called nighttime hours [R. 196, 197, 201]. This is not contradicted, but is conceded in the affidavits filed by the substation operators, from which we quote:

“The undersigned plaintiffs being first duly sworn, depose and say: that the only agreement entered into by the substation employees and the defendant, Southern California Edison Company, was that said employees would be hired on a salary basis, were required to remain on the premises twenty-four hours per day, and were to receive time and a half for all hours worked in excess of forty hours in each work week.” [R. 303.]

“After eight hours the substation operators considered themselves free from routine duties but understood that they were still, for the balance of the 24-hour work day, in the employ of the defendant company.” [R. 304.]

“Plaintiffs were paid a monthly salary and were required to be on the premises twenty-four hours a day. They were instructed to put down only eight

hours per day on their time cards. Overtime for special emergency work was paid after eight hours per day.” [R. 305.]

In the fourth paragraph of the third amended complaint appellants allege:

“ . . . plaintiffs were employed at a *stipulated monthly salary based on 40 hours of work each week* and were to receive in addition thereto, additional compensation at one and one-half times their regular rate for all hours worked in excess of forty hours in each work week.” [R. 107-8.]

The only dispute between the parties is as to whether the resident employees, as they claim, actually had a definite eight hour shift in which they were expected to be on duty at their station, or whether, as the defendant claims, they had no definite time in which to perform any services other than designated calls to the switching center, and usually did not consume anywhere near eight hours a day or forty hours a week in active duty. There is no dispute that they received a monthly salary. Appellants assert it was paid for their eight hour a day shift or for 40 hours for a five day week. Defendant, contending appellants did not take forty hours for their services, concedes that their salary was based upon the equivalent of forty hours of service per week. This is evidenced not only by the method which was used in calculating plaintiffs’ overtime, but by the fact appellants reported and were paid overtime only for emergency services performed during the nighttime hours.

Appellants argument that they understood the bulletin A-36 as promising pay for their standby time is absurd, in view of their conduct as disclosed by this record.

As we have pointed out, at the time of the issuance of those bulletins it was not usually supposed that standby time was compensable, and it is clear that it was not being paid for by the defendant either before or after the revision of the bulletin of 1942 or 1943. Could any intelligent person have understood the bulletin as promising him compensation for standby time when at the time of his employment he was told that the job required him for five days a week to live on the Company's premises, and during those days to remain twenty-four hours a day close enough to the station house or his residence to be able to respond in case his services were needed for an emergency; that he would be paid overtime for any emergency work performed during the nighttime hours, and then, by bulletin, informed that he had no regular hours in which to perform his services but that forty hours should be considered a week's work, and he would be paid time and a half for any excess hours; that he was then instructed to show for his normal services eight hours, neither more nor less, regardless of whether he performed that amount of service, and to show as overtime only emergency services performed during the nighttime hours, and that his overtime compensation would be determined by computing his hourly rate on the basis that his monthly salary was paid for forty hours of service?

If the appellants were receiving any part of their salary as compensation for their standby time as such (which they vociferously denied in their complaints, affidavits and depositions), it is certain that, to their knowledge, the hourly rate upon which their overtime compensation was fixed was erroneously computed so as to give them grossly excessive overtime compensation. In other words, if the salary was received as compensation

not only for forty hours of active service but also for their standby time as such, then in determining their hourly rate the computation should have been made on the basis of their salary being paid either for eighty or one hundred twenty hours.

The testimony of Mr. Wert (substation operator) is in accord with all other portions of the record on the subject:

“Q. And that your monthly rate was broken down to give you an hourly rate based on 40 hours a week. Is that correct? A. Our monthly wage was broken down to show the hourly rate that we earned in that month, yes.

Q. Based upon 40 hours in the week? A. That is right.

Q. It was not based upon 24 hours in a day, was it? A. It never has been.

Q. It was based upon eight hours a day, five days a week, or 40 hours a week. Is that correct? A. That's correct” [Ap. 80].

Wert's Dep., pp. 54-55, line 20/4.

How can appellants now claim that their standby time was compensable and that they understood it to be such, in view of the fact that they knew their overtime payments for emergency services during nighttime hours was computed on the basis *that their salary was not applicable to or paid for their standby time?*

Appellants assert that in showing eight hours per day for their normal services whether they actually consumed that amount of time or not, and in only reporting as overtime emergency services performed in the nighttime hours, they were following the instructions of the defendant. But such fact if true does not avail them. That

the appellants' acquiescence in the defendant's instruction to report only overtime for emergency services in the nighttime hours, and acceptance of overtime figured on the basis that their salary was applicable to 40 hours of service a week, constituted both an implied and express agreement that their standby time for which they are seeking recovery was not compensable. See:

Williams v. Jacksonville Terminal Co., 315 U. S. 386, 398;

Shepler v. Crucible Fuel Co. (C. C. A. 3), 140 F. 2d 371, 373-4;

Peffer v. Federal Cartridge Corp. (D.C., Minn.), 63 Fed. Supp. 291,304.

If it be conceded for the purposes of argument that such an employment arrangement would not have been a bar to recovery under the original act before its amendment (actually we believe that the factual situation could have been shown to have been such as to have rendered the arrangement valid, even under the original Act), it is clear that under Subsection (d) of Section 2 of the Portal Act, the District Court is divested of jurisdiction of the subject matter of the causes of action. Subsection (a), declaring that no activity is compensable unless made so by (1) an *express provision* of a contract, (2) custom or practice, is followed by Subsection (b) which reads:

“(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice *only when it was engaged in during the portion of the day with respect to which it was so made compensable.*”

Portal Act of 1947, Part II, Sec. 2(b).

Anderson, a substation operator, testified:

“A. I consider as standby time, any time after my dinner hour until going to bed, although we were required to get up during the night if an alarm rang. We were still on standby when we were asleep.”

[Anderson's Dep., p. 34, lines 5/8; Ap. 43.]

Obviously the Subsection (b) was inserted for the express purpose of prohibiting recovery for standby time for which recovery is here sought.

We would again call attention to the debate (*ante* page 27) on the Conference Report to the house in which the Chairman of the House Committee assured Representative Hinshaw that Subsections (a) and (b) of Section 2 covered the precise situation of the instant cases and barred recovery, the Committee believing recovery for such on-call or standby time was not expected by the employees and would be windfall compensation.

While there is no question but that the record which we have thus far called to the attention of the court is entirely contrary to the claim of appellants that they understood Bulletin A-36 as promising them overtime compensation for so-called “standby time,” the depositions of the appellants are so absolutely contradictory of that claim that we feel justified in calling them to the attention of the court.

Ellingsford (substation operator)—

“Q. Did you ever put down your standby time after 6:00 o'clock, I mean, on this sheet? A. No. They told me not to.

Q. Who told you not to? A. Every chief clerk of every division I have worked in. *They said standby time was not allowed.*” [Dep. p. 42, lines 15/20; Ap. 54].

Wert (substation operator)—

“Q. Did you ever receive any pay for the standby time? A. *Not as such.*”

* * * * *

“Q. By Mr. Sokol: What do you mean by standby time, Mr. Wert? A. *Time when you are off duty, but on call.*” [Dep. p. 42, lines 17/26; Ap. 78].

Kaneen (substation operator)—

“Q. You didn’t put your standby time on that? A. No.

Q. Why not? A. There was no place to put it.

Q. What do you mean by that? A. There was no blank left on there to put it. In other words, you filled the form out in the manner requested by the Company.” [Dep. p. 47, lines 19/26; Ap. 67].

Rogers (hydro station attendant)—

“Q. You only put down, then, from 7:30 a. m. to 4:30 p. m.? A. With one hour out for lunch.

Q. Why don’t you put in the time after 4:30 p. m. that you are waiting for these calls? A. Well, that would be overtime, wouldn’t it?

* * * * *

Q. And the reason you don’t put that other time down is— A. *You wouldn’t get any pay for it, if you put in for waiting, overtime for waiting. You’ve got to show something there that you did.*” [Dep. pp. 33/34, lines 15/1; Ap. 95].

Borden (primary service man)—

“Q. But still you don’t get paid for any of that standby time, except the time you actually leave your home to go out on duty? A. *That is right; just what I am called out on.*” [Dep. p. 45, lines 16/19; Ap. 19].

Honnell (primary service man)—

“Q. By Mr. Sokol: I would like to ask you this question: Why haven’t you put in this so-called stand-by time on your overtime sheet? Why haven’t you asked for overtime on that? A. You mean standby after 5:00 o’clock?

Q. Yes. A. *Well, I didn’t think there was any use. I didn’t think anybody got it.*” [Dep. pp. 24/25, lines 26/7; Ap. 29].

Smith (primary service man)—

“Q. If that was the case why didn’t you put in for the time that you were waiting at home to answer those calls? A. Well, I didn’t figure there was any use. Nobody else ever done it.”

* * * * *

“Q. *You mean that is the custom and practice in the company?* A. *That is the way they had been doing for years, at least ever since I’ve been there.*

Q. Not to pay for that time? A. Yes.” [Dep. p. 19, lines 8/23; Ap. 32.]

Culbertson (primary service man)—

“You only put in for the actual time that you worked. Is that right? A. Yes.

Q. When you left your home and went out on an emergency? A. Yes; that is the only time.

Q. Why did you only put in for that time? A. That is what they told us to do.

Q. Who told you to do that? A. The superintendent." [Dep. p. 43, lines 17/26; Ap. 24.]

"Q. But you only got paid for the time you spent there in actual work, and didn't get paid waiting to answer that call? A. No.

Q. You did not? A. I did not get paid." [Dep. p. 48, lines 11/16; Ap. 25.]

Griffes (head works tender)—

"Q. Otherwise, the time between 4:30 p. m. and the time that the alarm rang, you don't get paid for that? * * * A. No." [Dep. pp. 35/36, lines 25/2; Ap. 114.]

Smith (primary service man)—

"Q. And so you never got any money for waiting? A. No.

Q. You never got any money for waiting around like that? A. Oh, no." [Dep. p. 23, lines 2/6; Ap. 33.]

Anderson (substation operator)—

"Q. Did you ever put down this standby time when you were waiting to do your work? A. No, I did not.

Q. Why not? A. *It wouldn't have been allowed to go through.*" [Dep. p. 33, lines 5/9; Ap. 42.]

Kaneen (substation relief operator)—

"Q. I see. However, the specific time that you got paid time and a half for was when you were actually answering emergency calls over at the station? A. Other than when we went on a six-day operation, yes." [Dep. p. 38, lines 16/19.]

Most appropriate is the famous, century-old observation of Lord Chief Justice Sugden, which has been universally followed by the State and Federal Courts of this country:

“ . . . tell me what you have done under such a deed, and I will tell you what that deed means.”

Attorney-General v. Drummond, 1 Dru. & Warren 353, 368; 2 H. L. Cas. 837.

As announced in the *Skidmore* decision:

“The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.”

Skidmore v. Swift & Co., *supra*, 323 U. S. 134, 137.

As bearing on the interpretation which the employees of the defendant placed upon the bulletin and their contracts of employment, it is interesting to note that while the record discloses without dispute that the A. F. of L. Union, representing certain of defendant's employees, had expended great effort through advertising, and otherwise, to induce all of the employees of the classes involved in this suit to join the suit, less than one-fifth have done so [R. 184-186]. Of course, the failure of the other employees to join in the suit is not a ground for denying the appellants relief if they are entitled to it. But, we feel that the failure of more than eighty per cent of the resident employees to join in suits, or otherwise advance any claim for overtime compensation beyond that which has been paid them for emergency services is additional evidence of the fact that none of the resident employees interpreted either their contracts of employment or the bulletin, or both together, as entitling them to any overtime compensation for their so-called standby time.

There Is No Theory Upon Which Recovery Can Be Allowed Plaintiffs in the Instant Cases Without Rendering the Portal Act Nugatory.

It is difficult to understand how the defendant can be held liable in the instant cases and any other employer not also liable for preliminary or postliminary activities to the same extent that he would have been under the interpretations given to the original Act. Wherever in any employment the employees are required to be upon the premises for any time before or after their active work or are required to perform any preliminary or postliminary activities, such time or services of the employees must necessarily have been taken into consideration by both parties in fixing the hourly rate of their pay or their weekly or monthly salary. In such cases, the hourly rate or their salary would necessarily have been less had the employer, instead of requiring the preliminary or postliminary services, hired other employees to perform them. Hence, in a situation such as we have assumed, *the employees and the employer must have agreed that the hourly compensation or weekly or monthly salary was sufficient remuneration for all the activities of the employees, and that their preliminary or postliminary time was not compensable as such.*

The assumed situation was prevalent in almost all places of employment throughout the nation and resulted in the flood of suits for overtime compensation which cascaded upon the courts in increasing volume with the expanding judicial interpretation of the Fair Labor Standards Act.

It is most significant that Congress did not permit recovery for activities which were made compensable by a contract. Congress undoubtedly realized that the word "contract" unqualified would embrace an implied contract

and might be held to apply to a theoretical or assumed contractual obligation. Congress was cognizant of the fact that the judicial interpretation of the Fair Labor Standards Act by following along lines, which, though logical, were wholly divorced from the realities of industrial life, had so extended the Act as to make compensable a multitude of activities that neither industry or labor had contemplated should be directly paid for, bringing industry to the verge of bankruptcy.

By the term "*express provision*" of a contract, it is clear that Congress intended that there should be no basis for any claim of either an implied or indirect agreement; that only such activities should be compensable where in any contract, oral or written, there was an "*express provision*" that the particular activity should be compensable, or made compensable by custom or practice.

Most appropriate is the language of the Massachusetts District Court in dismissing after the effective date of the Portal Act a suit, for overtime compensation:

" . . . It is therefore quite essential that jurisdiction should be clearly established before proceeding with such a vast task. *It cannot be established by tortous reasoning as to the construction of a contract.* The statute calls for a *clear and express provision of a contract* making the time for which compensation is sought compensable in fact and in law."

Finn, et al. v. Bethlehem Steel Company (D. C. Mass.), 15 Labor Cases, Para. 64, 592, p. 73, 847. See Appendix pages 129-137 where many cases to same effect are digested.

It is certain in the instant cases that there was no express promise or contract to pay for any standby time. With equal clarity, it is established that the custom and

practice was *not* to pay for standby time, but only for emergency services performed during nighttime hours. As we have before pointed out, the overtime paid for those emergency services would have been grossly excessive if the employees had considered (as they vehemently insist they did not) that they were receiving compensation for their inactive on-call or standby time.

Hence, we submit that there is no theory upon which the defendant can be held liable for the sixteen or any hours of on-call or standby time for which plaintiffs here seek recovery that would not equally render every employer liable for any preliminary or postliminary activities to the same extent that such liability would have existed before the Portal Act.

Defendant's Application to the War Labor Board.

The appellants apparently place great reliance on the application which the defendant made in 1945 to the War Labor Board, setting out a portion of the application (B. 35) wherein appellants advised the Board that the defendant desired to change its method of operation of its sub and hydro stations by relieving the operators of the necessity of remaining on duty for twenty-four hours a day, but desired to continue the same salary payments to them. The appellants argue that the application was an admission that the appellants' standby time was compensable. There are a number of answers.

The application was made after the *Glenn* suit was filed, but prior to the filing of the *Drake* suit [D. R. 6]. An examination of the defendant's answer to the second amended complaint in the *Glenn* case [R. 17-36] will show that the defendant, prior to the Portal Act, denied the right of the plaintiffs to recover for standby time.

The reason for the application was that if, contrary to the defendant's expectations, the plaintiffs should recover in the *Glenn* suit, the defendant not only would be obligated to pay an enormous amount for overtime and liquidated damages but would also be obligated for enormous future costs—costs which would be out of proportion to the salaries paid much more skilled employees, and that would render the defendant's continuance of its then system of operation impracticable. Hence, the defendant, at very great expense, installed automatic machinery so as to be able to dispense with the requirement that resident employees remain on its premises after their last call in the evening to the switching center.

There is no question but what the conditions of service of the resident employees would be changed by the proposed method of operation without any change in compensation, except that they might not be called on as frequently for emergency services during the nighttime hours. As we have heretofore pointed out, throughout the industry a large majority of employees were required to be upon the employer's premises some time before and after work to perform preliminary and postliminary activities, and that it had generally been assumed that their pay either by hourly rate or by a weekly or monthly salary for their direct services was sufficient so there was no pay for their preliminary or postliminary activities. The Portal Act was passed for the express purpose of relieving employers for liability for such activities.

In addition to the foregoing considerations, the application to the War Labor Board could not be considered as an admission of any character. The wage stabilization statutes in force at the time of the application prescribed very drastic penalties upon any employer who made any

change in his methods of operation which involved a possible reduction of duties without a commensurate reduction of wages or salaries, unless the permission of the War Labor Board was obtained.

While the defendant has always taken the position that the plaintiffs in the *Glenn* case were not entitled to recover for their standby time, plaintiffs were insisting that under the judicial interpretation of the Act they could recover.

No one, of course, can foretell the result of any present or future litigation. The problem which defendant was faced with by the proposed change in the method of operation would not have been solved by its own determination or conclusion that it was not making an increase in compensation. Its problem was, whether at sometime in the future it should be claimed by any governmental agency that by changing its method of operation without obtaining permission of the Board it had violated the stabilization laws. If such claim should be made and sustained, the defendant would have been faced with staggering penalties. Ordinary prudence would dictate to any sane man that as a matter of precaution, the approval of the War Labor Board should be obtained of its proposed change in method of operation.

Finally, it should be pointed out that recovery can not be based upon any admissions of the defendant, or even statements of the direct or indirect compensability of the time, the Portal Act specifically providing that there can be no recovery for activities unless there were either (1) an express *provision* of a *contract* to pay for such activities or (2) a *custom or practice at the particular plant to pay for such activities*. It is certain that the applica-

tion to the War Labor Board in no sense constituted or could constitute a contract, express or implied, that standby time was compensable; neither could it constitute or evidence any practice or custom to that effect.

(3) THE RECORD SHOWING THAT THE COURT WAS WITHOUT JURISDICTION OF THE SUBJECT-MATTER OF THE ACTION, THE DISTRICT COURT HAD NO OTHER COURSE THAN TO ENTER A DECREE OF DISMISSAL.

As noted, the appellants cite *Kennedy v. Silas Mason Co.*, 334 U. S. 249, and *Twigg v. Yale & Towne Mfg. Co.*, 7 F. R. D. 488, as sustaining the proposition that generally summary judgment should not be granted under the Fair Labor Standards Act, quoting from the first case:

“ . . . No conclusion in such a case should prudently be rested on an indefinite factual foundation.”

Kennedy v. Silas Mason Co., 334 U. S. 249, 256.

There are two answers. First, summary judgment was not given, but the court, of its own motion, dismissed the suits for want of jurisdiction.* Second, the factual situation here is not indefinite and, as we have shown, there is no conflict on any matters that are at all material to the issue of jurisdiction. The instant cases are not at all factually similar to *Kennedy v. Silas Mason Co.*, *supra*,

*In the District Court it was suggested, both in the oral argument and in the defendant's closing brief, that the court was probably without jurisdiction of the subject-matter.

where portions of the record on which the District Court acted were not before the Supreme Court. Further, there was no contention in that case that it was affected by the Portal Act; nor was there any question of the jurisdiction of the subject-matter of the action by either court.

In this connection it may be well to note the suggestion of the appellants (B. 17) that the complexity of the case may be illustrated by the fact that the trial court entered its judgment before it discovered that certain depositions taken in the case had not been filed.

The actual facts were that, through the inadvertence of the notary taking them, four depositions had not been filed before the hearing on the motions. The defendant in its points and authorities and its oral argument had referred to and quoted from all of the depositions that had been taken, including the four that had not been filed. As its references and quotations were not challenged by the plaintiff, the court naturally acted upon them without going to the Clerk's office to find out if the originals were actually on file. As a matter of fact, both parties assumed that all the depositions that had been taken had been filed, and it was not until the Clerk was preparing the record that it was discovered that four were missing. The parties stipulated that they should be filed *nunc pro tunc* as of the 5th and 8th of October, 1945.

“ . . . and that for all purposes, it shall be deemed and treated as though the said depositions had been on file at all times respectively since the 5th and 8th day of October, 1945, . . . ” [R. 355.]

This stipulation was approved by the Court [R. 356]. Furthermore, it is to be noted that the four depositions could be eliminated from the record without the result being changed. Appellants do not point to any testimony in any of them to which we have called the court's attention that was not cumulative of like testimony in other depositions that had been filed.

Clearly the inadvertent omission of filing the depositions does not tend to show (1) any conflict in the facts, (2) that the facts are complex, or (3) that either the District Court or this Court should encounter any difficulty in applying the applicable law to the facts which are disclosed without dispute by the record.

In *Tweed v. Yale & Towne Mfg. Co.*, 7 F. R. D. 488, cited by appellants (B. 15/16), the court found that the facts as to the plaintiff's right to recover were in dispute and hence, of course, could not grant a summary judgment. In this case we have demonstrated, we believe, that insofar as any fact that is material to the question of the jurisdiction of the court, there is absolutely no controversy in the record.

It appearing without controversy that the plaintiffs seek recovery for their so-called "stand-by time," and it further appearing without controversy that such stand-by time was not made compensable by an *express or any provision* of a contract or by practice or custom, the District Court under the express provisions of subsection (d) of Section 2 of the Portal Act was without jurisdiction of the subject matter of the suit.

It may be conceded that it is somewhat unusual for a statute to make jurisdiction of a cause of action dependent upon the right of the plaintiff to recover, but the purpose of Congress in so providing is perfectly apparent.

When Congress took up the study of the problems which were confronting the nation by the flood of suits for overtime compensation, it found the situation contained two grave dangers: (1) the bankruptcy of industry; (2) the almost incalculable amount of time of the courts that would be consumed by the trial of the pending suits. Congress undoubtedly realized that merely prohibiting recovery for activities which were not compensable by an express contract or custom or practice would only partially solve the problem. It knew, of course, that summary judgment could not be entered if there was any conflict in the record. Congress must have realized that any lawyer of ingenuity could, by carefully worded affidavits, pleadings and answers to interrogatories, raise an apparent conflict on the face of almost any record sufficient to defeat summary judgment. It knew that the pending suits which had been filed for billions of dollars would not be easily surrendered or abandoned by counsel who had instituted them.

It was the obvious purpose and intent of Congress by withdrawing jurisdiction of suits for non-compensable activities to enable the courts to summarily dispose of such actions and avoid the enormous amount of time that would be taken in their trials, as well as to relieve the parties of

the almost unbearable expense that such trials would entail.

We submit that where it is clear from the record, as it is in the instant cases, that the plaintiffs cannot prove an applicable contract, custom or practice, it is not only the duty of the court to dismiss the action but it is to the benefit of both parties for the court to do so, rather than subjecting them to the great expense of prolonged litigation. Even in cases of summary judgment which do not involve the question of the court's jurisdiction (which, of course, must always affirmatively appear on the face of the record to enable a federal court to proceed), the decisions hold that facts should not be assumed to exist which are not disclosed by the record, and that plaintiffs must be presumed to have presented their best case in its strongest light [See cases collated at Ap. p. 150 to p. 152].

When in the instant cases the District Court on considering the motions of both parties for summary judgment ascertained that it appeared from the record that it was without jurisdiction of the causes, it had no other alternative but to dismiss them on its own motion for want of jurisdiction.

“And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, *although the parties make no contention concerning it.*”

United States of America v. Corrick, 298 U. S. 435, 440, 80 L. Ed. 1263, 1268.

In affirming the orders of the District Court entered after the effective date of the Portal Act and dismissing two suits filed prior to the Portal Act, the Court of Appeals for the Second Circuit said:

“We cannot yield to plaintiffs’ contention that the court’s action on the motion to dismiss was premature. If it appeared to the satisfaction of the court *at any time* after the suits were brought that they did not really and substantially involve a dispute or controversy properly within its jurisdiction, it was its duty to proceed no further and to dismiss the suit.”

Fisch v. General Motors Corporation;

Bateman v. Ford Motor Co. (C. C. A. 6th, 1948),
169 F. 2d 266, 269; cert. den. 335 U. S. 902, 93
L. Ed. (Adv.) 247.

See also Appendix, pages 124 to 125, where many additional authorities to the same effect are collated.

(4) THE PORTAL-TO-PORTAL ACT IS CONSTITUTIONAL.

Plaintiffs, under Point VIII (B. 50-52), challenge the constitutionality of the Portal Act. In view, however, of their statement that, because of the decision of this Court contrary to their contention in *Potter v. Kaiser Company, Inc.*, 171 F. 2d 705, they make the point only to preserve it in case the Supreme Court holds the Portal Act unconstitutional. We think no argument on the matter is necessary, but we have, however, collated on pages 121 to 123 of the Appendix numerous decisions of the appellate court directly sustaining its constitutionality.

II.

The Defendant's Affirmative Defense of Good Faith Reliance Upon Administrative Regulations, Rulings, Approval and Interpretation of Agencies of the United States Is Established by the Record as a Matter of Law.

The defendant, in its third and fourth affirmative defense [R. 155-156], pleaded its good faith in declining to pay overtime compensation for standby time, in that it relied upon administrative regulations, orders, rulings, approvals and interpretations of administrative agencies of the Government of the United States.

The questions as to whether the record shows that such plea was established under Section 9 of the Portal Act so as to be a complete defense, or under Section 11 of the Act so as to give the court discretion to disallow liquidated damages, were not germane to the issue of jurisdiction and were not passed on by the District Court. If this court agrees with the action of the court below it will, of course, be unnecessary to consider these affirmative defenses.

However, we are confident that if the court below had jurisdiction of the subject-matter of the suits, it must be held that the affirmative defenses were established as a matter of law by the record.

Section 9 of the Portal-to-Portal Act is printed in full in the appellants' brief (page 39). It clearly provides that where an employer would otherwise be liable under the statute, it, nevertheless, shall be a complete defense to allege and prove that he acted in good faith "in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency

of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. * * *

The specific governmental acts and regulations on which defendant relied are set out in the record [pp. 158-166].

The first regulation relied on is Interpretative Bulletin No. 13 issued in July, 1939, revised in other respects in October of that year and again in October of 1940 [R. 158-160], with reference to employees engaged to perform specific tasks who were required to remain upon the defendant's property subject to call [R. 158-160].

The next ruling and interpretation of an agency of the United States is set out in the defendant's answer [R. 161-165], wherein it is alleged that the Pacific Gas and Electric Company (hereinafter referred to as "P. G. & E.") operated an electrical distributing system in substantially the same manner as the defendant and that the terms and conditions of the employment of resident P. G. & E. employees were substantially the same as those of defendant's employees of that class [R. 160-161]; that the union representing the P. G. & E. employees, demanded increased pay for nearly all of its employees including premium pay for its resident employees. The Board referred the controversy to a panel which reported:

"3. Resident Employees

"The panel unanimously recommends that no change be directed in the matter of the wages of resident employees.

"We were impressed with the fact that they are now receiving 40 hours pay for 30 hours work and time and one half for overtime; that they are their own timekeepers and that they have considerable free time for their own pursuits.

“We recognize that they are more or less limited in their coming and going and that in certain surroundings such limitations can be very irksome.

“But balancing the values and the disvalues of the present arrangement we do not believe that undue hardships are involved.” [R. 163-164.]

The Board unanimously adopted that portion of the Panel’s recommendation [R. 164].

The facts with reference to the application to the War Labor Board and its rulings as alleged are admitted by the appellants [R. 287, 325]. The affidavit of Mr. R. G. Kenyon, the head of defendant’s Personnel Department [R. 208-211], and of Mr. Mullendore, the president [R. 214-215], set forth that the terms and conditions of employment of the P. G. & E. resident employees and those of the defendant were substantially the same, and that the defendant at all times relied upon the ruling of the War Labor Board [R. 210-211, 215]. The facts stated in those affidavits are not contradicted.

Lastly, it appears from the affidavit of Mr. Mullendore [R. 212-213] and also from the affidavit of Mr. Stellern [R. 247-248] that Mr. Stellern was the manager of the Wage and Hour Division for Southern California and Deputy Administrator of the Act for Southern California and Arizona from some time in the month of May, 1940, to November, 1946 [R. 246], that the payroll records of the defendant had been inspected several times by his inspectors who had reported that in their judgment the Company was in full compliance with the Act [R. 247], that at the suggestion of Mr. Chambers, who was the public relations man for the Administrator of the Act, he, Stellern, had arranged a radio interview to inform employers

and employees alike of the provisions of the Act [R. 248], that Mr. Stellern had selected Mr. Mullendore to ask the questions which he, Stellern, would answer, because Mullendore at that time was president of the State Chamber of Commerce [R. 248]. The script used by both Mr. Mullendore and Mr. Stellern was prepared by Mr. Chambers from information Stellern had given Chambers [R. pp. 248-249]. In that script Mr. Stellern volunteered to Mr. Mullendore the following:

“* * * *I am happy to be able to tell you that your company was one of those whose records were inspected in this current program, and we found that you are operating in complete compliance with the Act.*” [R. 213.]

Mr. Mullendore further states that the Company's reliance on the administrative bulletin and upon the rulings of the War Labor Board were strengthened by the fact that all their records were inspected by the government and no complaint had been made [R. 215].

As we read appellants' brief, their main argument seems to be (1) that the defendant could not have relied on Interpretative Bulletin 13 after the decision in the *Armour* and *Skidmore* cases; (2) that the radio script between Stellern and Mullendore was not an administrative regulation, approval, or interpretation of any agency; (3) that the defendant had no right to rely on the War Labor Board's ruling because the Board was not concerned with enforcing the Fair Labor Standards Act, and because of the application of defendant to the War Labor Board to approve its proposed changed method of operation.

(1) THE DEFENDANT WAS FULLY JUSTIFIED IN RELYING AT ALL TIMES UPON INTERPRETATIVE BULLETIN 13.

Assuming for purposes of argument without in any way so conceding—that the decisions referred to cast a doubt as to the accuracy of the bulletin as to defendant's resident employees (a subject hereafter to be discussed), it is to be noted that paragraph 8 [R. 160] was in no wise involved in the decisions in the *Armour* and *Skidmore* cases. Paragraph 8 fits the situation as to the primary service men like a glove. It is quite apparent that the bulletin constitutes an absolute and complete defense under Section 9 as to the primary service men. As heretofore noticed, the appellants discuss only the right of recovery of the resident employees, and do not mention the primary service men or the effect of paragraph 8 of the bulletin as to them.

Paragraphs 6 and 7 of the bulletin [R. 158-9] clearly justified the defendant in assuming that its resident employees were not entitled to overtime compensation except for their emergency services, and this is impliedly conceded by the appellants. They argue, however, that the *Armour* and *Skidmore* decisions showed that the bulletin was erroneous, and that the defendant, after those decisions, had no right to rely upon it. This contention is unsound. An examination of the decisions cited will show that neither of them questioned the bulletin. They simply held that its examples were not applicable to the factual situation then being considered by the court. If it were necessary, we believe we could demonstrate that even on the present rec-

ord, accepting every contention of the appellants, it must be held as a matter of law that the factual situation of the instant cases was so dissimilar from the *Armour* and *Skidmore* cases that the defendant had a right after those decisions to rely upon the interpretative bulletin, even if such right were tested by the bulletin without regard to the acts of other governmental agencies hereafter discussed.

But if, for the purpose of argument, it be assumed that as to its resident employees the right of the defendant to rely on the bulletin after the *Armour* and *Skidmore* decisions is a question of fact which could not be decided on summary judgment, it is nevertheless obvious that since the defendant had a right to rely on it up to the time of those decisions, such right, under Section 9 of the Portal Act, would be a complete bar to a recovery by appellants for any activities prior to those decisions.

Appellants will undoubtedly reply that, assuming the right of the defendant to rely on the bulletin prior to the *Armour* and *Skidmore* decisions, if it had no right thereafter, the continuation of its method of compensation without change shows that its previous act was not in reliance on the bulletin.

There are two answers to such argument, if advanced: (1) The difference between the factual situation of the instant cases and the decisions referred to; (2) the interpretation given to the factual situation of the instant cases by the Administrator through his agent hereafter discussed.

(2) DEFENDANT WAS ENTITLED TO RELY UPON THE INTERPRETATIONS AND STATEMENTS OF MR. STELLERN, IN CHARGE OF THE SOUTHERN CALIFORNIA OFFICE OF THE DEPARTMENT OF LABOR, AND DEPUTY FOR THE ADMINISTRATOR OF THE ACT FOR SOUTHERN CALIFORNIA.

Appellants cite several cases of which *Burke v. Mesta Mach. Co.* (D. C., Pa. 1948), 79 Fed. Supp. 588, 612, is typical, to the effect that defendants cannot rely upon inspectors of the Labor Department. In several of the cases cited, the advice of these inspectors was contrary to the express rulings of the Administrator. Thus, in the *Burke* case, it is said:

“ . . . Even so, such advice by an inspector, who would be considered in the lowest echelons of the Department of Labor, was inconsistent with the uniform and well-publicized interpretations and ruling made by the Administrator himself and by those responsible officials to whom he had delegated the exacting task of interpretation.”

Burke v. Mesta Mach. Co. (D. C., Pa.), 79 Fed. Supp. 588, 612.

However, Mr. Stellern was not an inspector. He was the deputy in Southern California for the Administrator. His actions were the actions of the department of which he was the head for Southern California.

In *Moss v. Hawaiian Dredging Co.* (D. C. N. D. Cal., Mar. 30, 1949), No. 25299-G, Bureau of National Affairs Daily Labor Report No. 66, Apl. 6, 1949, p. F-1, 16 Labor Cases, par. 65,066, the District Court for the Northern District of California held that it was a defense under Section 9 to show that the employer relied in good

faith upon the letter of the Regional Attorney for the Wage and Hour Division.

In *Darr v. Mutual Life Insurance Co.* (C. C. A. 2), 169 F. 2d 262, 265-6 (certiorari denied 335 U. S. 871), the Second Circuit Court of Appeals held it was a complete defense under Section 9 to show that the defendant relied in good faith on the administrative practice of the Wage and Hour Division *not to enforce the Fair Labor Standards Act against the insurance industry.*

In *Kenney v. Wigton-Abbott Corp.* (D. C. N. J., 1948), 80 Fed. Supp. 489, the court held that it was a good defense under Section 9 to show that the employer relied in good faith upon a circular letter of the Bureau of Yards and Docks of the Navy.

(3) DEFENDANT WAS CLEARLY ENTITLED TO RELY UPON THE RULING OF THE WAR LABOR BOARD IN THE PACIFIC GAS AND ELECTRIC CASE.

While the appellants attack the right of the defendant to rely upon Bulletin 13 and the acts of Mr. Stellern as above set out, they devote little time to the ruling of the War Labor Board. That, of course, was clearly a governmental agency within the meaning of Section 9, and it has been so held. See:

Rogers Cartage Co. v. Reynolds (C. C. A. 6) (1948), 166 F. 2d 317.

Appellants argue that the Board was not concerned with whether the P. G. and E. was violating the Fair Labor Standards Act or not, but only with war problems. This contention, we believe, is untenable. No regulation of the government with reference to preventing increases in wages was supposed to modify in any way the

provisions of the Fair Labor Standards Act, and the War Labor Board in discharging the functions which had been delegated to it certainly could not authorize the violation of the Act, in fact, it was its duty to see that it was complied with. No lawyer or layman can read the claims of the union and of the company on the one hand and the recommendation of the panel which was unanimously approved and reach any other conclusion than that the Board considered the method of paying the resident employees was not only sufficient *but in entire compliance with federal laws*. If, in fact, it believed that defendant was not in compliance it would at least have been its duty to have called that to the attention of the parties. *Indeed, it is difficult to conceive of the War Labor Board acting as a stabilization board and having a claim presented to it for increase in compensation of resident employees and denying it if under the Wage and Hour Act they were entitled to that or greater compensation.*

It is true that the rulings were with reference to a different company, but the record is uncontroverted that the conditions were precisely the same.

Section 9 of the Portal Act makes it a complete defense, even where an employer would otherwise be liable for overtime compensation and penalties notwithstanding the provisions of Sections 2 and 4 of the Act, to plead and prove that in good faith he relied on "an administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, *or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged.*" It is difficult to understand how there could be a clearer case of enforcement policy with respect to the class of employers to which defendant belongs than the ruling of

the War Labor Board as applied to defendant's method of compensating its resident employees.

Appellants' argument that the defendant's lack of good faith in its reliance on the rulings of the War Labor Board is shown by its application to that Board in November of 1945, in which it sought the approval of the Board of the change which it contemplated making in the method of operating its sub and hydro stations, has been fully answered *ante*, pp. 47 to 49.

(4) THE OVER-ALL PICTURE OF THE ADMINISTRATIVE REGULATIONS, ORDERS AND RULINGS RELIED ON.

Thus far, we have been considering separately the various acts of the governmental agencies relied upon. When they are considered together, the composite picture shows that the defendant was more than justified in assuming that its method of compensating its resident employees was in compliance with the statute.

Thus, we find from the record that in October, 1940, the Administrator of the Act issued his Interpretative Bulletin 13, paragraphs 6 and 7 of which clearly advised that the resident employees were not entitled to standby time, and paragraph 8 that the primary servicemen were not entitled to overtime for being on call. On July 5, 1941, the Administrator of the Act, through his deputy for Southern California, publicly advised the defendant that the defendant's records had been inspected and it was found to be operating "in complete compliance with the Act." In 1943 as the result of a complaint which the Department of Labor received that the resident employees were not receiving proper overtime, the defendant was again inspected and the Department reached the conclusion that defendant's method of computing compensation

did not violate the Act [R. 249]. The defendant knew of such inspection and the conclusions reached by the Department and naturally assumed that that decision was correct [R. 215].

Following the unsolicited public announcement of the Deputy Administrator of the Act for California that the Department of Labor had inspected defendant and found it to be operating in strict compliance with the Act, premium pay for resident employees of Pacific Gas & Electric Company was demanded, and on July 8, 1943, the War Labor Board panel unanimously recommended against granting any increase, holding that the overtime compensation for emergency services was all they were entitled to [R. 162-165], and in October, 1942, the War Labor Board denied the application of the Pacific Gas & Electric resident employees [R. 164].

While it is true that the Supreme Court in the *Armour* and *Skidmore* cases had held that the factual situation there considered did not come within the examples in Interpretative Bulletin 13 and the plaintiffs there were entitled to recover for standby time, it is equally true that the Department of Labor and the Administrator of the Act, to the knowledge of the defendant, were fully cognizant of the *Armour* and *Skidmore* decisions and both were familiar, as defendant knew, with its method of compensating its resident employees. Notwithstanding the decision in the *Armour* and *Skidmore* cases, no attempt was made by the Administrator to require any change in defendant's method of compensating its employees.

Can there be any question but that the combined ruling of the War Labor Board plus the failure of the Administrator of the Act after the *Armour* and *Skidmore* decisions

were rendered to inform the defendant that his previous advice to the defendant that it was operating "in full compliance with the law," was erroneous or to take any steps to require the defendant to change its method of operation, *constituted within the meaning of Section 9 an "administrative . . . approval or interpretation" of an agency of the United States or an administrative practice or enforcement policy of such agency with respect to the class of employers to which defendant belonged?*

If the record in the instant cases do not constitute a defense under Section 9 of the Portal Act, it is difficult to contemplate what would.

As we have seen in *Darr v. Mutual Life Insurance Company* (C. C. A. 2), 169 F. 2d 262, 265 (certiorari denied 335 U. S. 871), the Circuit Court of Appeals held that it was a complete defense to an insurance company sued for non-payment of overtime that it had not made such payments in reliance upon the policy of the Department of Labor not to enforce the Act against insurance companies. Unless that decision is to be disregarded, it seems to us certain that it must be held that the defendant had a right at all times to rely upon Interpretative Bulletin 13 and the rulings of the War Labor Board.

We submit that under the rule announced in *Darr v. Mutual Life Insurance Company*, *supra*, 169 F. 2d 262, 265, as well as in reason, the failure of the Department of Labor, under the circumstances outlined, to take any steps after the *Armour* and *Skidmore* cases to cause the defendant to change its methods of compensating its employees, was in every sense an approval of defendant's method of compensating its employees by a governmental agency—in fact, by the very agency created by Congress

to administer the Act. To hold that the defendant could not rely on it is to denude Section 9 of any practical force or effect.

Considering that by Sections 2 and 4 Congress had prohibited recovery for both past and future activities which were not compensable by the express provisions of a contract, custom or practice, Congress must have intended to protect employers where the employer had relied upon a ruling, regulation, interpretation or approval of a responsible governmental agency from further liability even where otherwise under the provisions of Sections 2 and 4, there would be a liability. It undoubtedly seemed to Congress that it would be unjust to allow various agencies to interpret the Act so as to lead an employer to believe that certain activities were not compensable and then have the employer subjected to liability because he relied on the acts of the government through those agencies.

We submit that to hold that if the District Court had jurisdiction, the defendant has not established a complete defense under Section 9 of the Portal Act, would be entirely against the clear wording, and even more so against the spirit, of the Portal Act.

If, contrary to our expectations, this Court should hold that the decision of the court below as to its jurisdiction was in error, then we believe it must nevertheless conclude that the dismissal of the action was correct for the reason that the defense of good faith under Section 9 has been clearly and incontrovertibly established.

Conclusion.

The primary servicemen were employed for a definite eight hour shift for which they were paid a monthly salary. Defendant claims, and some of the primary servicemen admit, that between shifts they were free to go where they pleased and do what they pleased, but in the event they did not return to their homes, or, returning, left their homes, they were required to advise the defendant of a telephone number where they could be reached in the event their services were needed in case of an emergency. Some of them claim they were required to remain at their homes during certain nights of the week in order to answer telephone calls. All concede that they were not paid anything either for being required to leave their telephone numbers or for remaining in their homes, if such requirement was imposed upon them, and that the only overtime which they ever reported or for which they received compensation was for emergency services performed between their shifts.

The resident employees were employed for certain definite services to be performed between the time their first call to the switching center in the morning, and the last call in the afternoon. They were paid an agreed monthly salary and no other compensation except time and half their hourly rate for any emergency services performed during the nighttime hours, their hourly rate being computed on the basis that their salary was applicable to forty hours of work per week. The only dispute between the parties is whether, as appellants claim, between the time of their first and last telephone calls they had a definite eight hour shift during which they were required to be on duty in or about their stations or, as the defendant claims, whether they had no specified time within

which to perform any of their active services other than the time for their first and last call to the switching center and certain other intervening calls, and that their active duties did not consume more than an hour or two a day. This factual dispute is immaterial to the question of jurisdiction. Neither contention affects the conceded fact that their salary was based on forty hours per week, that there was no contract, custom or practice to pay for their on call or standby time, and that the only overtime which they reported or for which they received or expected to receive compensation was for emergency services during the nighttime hours. Appellants admit that they have been paid for all overtime that they reported.

The suit is to recover for sixteen hours of standby time. It is clear that the Portal Act was passed for the explicit purpose of prohibiting recovery for such services unless made compensable by an *“express” provision* of a written or oral contract or *by custom or practice*. The record not only fails to disclose such a contract or agreement, but establishes that the understanding was precisely to the contrary.

For the explicit purpose of enabling the courts to summarily dispose of suits based upon activities that were compensable under the judicial interpretation given the original Act, but made non-compensable by the Portal Act, Subsection (d) of Section 2 withdrew from the courts jurisdiction of such suits.

We submit that the court below had no other alternative than to dismiss the actions for lack of jurisdiction.

We respectfully, but confidently, submit that its judgment of dismissal must be affirmed both because (1) its conclusion as to its lack of jurisdiction was correct, and (2) the affirmative defenses of defendant's good faith reliance were established as a matter of law.

All of which is respectfully submitted.

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Nos. 12070-1

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12070.

MYRON L. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

No. 12071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

APPENDIX TO REPLY BRIEF OF APPELLEE.

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APPENDIX.

I.

Excerpts From Congressional Debates.

(1) SUMMARY OF LEGISLATIVE HISTORY OF THE PORTAL-TO-PORTAL ACT.

Almost immediately upon the convening of the present Congress both Houses took up the problem confronting the nation from the rising flood of so-called portal-to-portal suits. The Senate Judiciary Committee drafted a bill which dealt only with existing claims. Before the Senate acted upon the bill drafted by its committee, the House passed its bill, H. R. 2157 (hereinafter referred to as the "House Bill"). Section 3 of the House Bill provided:

"Sec. 3. No action or proceeding of any kind whether or not commenced prior to the effective date of this act, shall be maintained to the extent that such action is based upon failure of an employer to pay an employee for activities heretofore or hereafter engaged in by such employee other than those activities which at the time of such failure were required to be paid for either by custom or practice of such employer at the plant or other place of employment of such employee or by express agreement at the time in effect between such employer and such employee or his collective-bargaining representative."

93 *Cong. Rec.* 1621 (February 28, 1947).

When the House Bill reached the Senate, the Senate Judiciary Committee amended it by striking out nearly all of its provisions and substituting those of the bill which it had drafted (hereinafter referred to as the

“Senate Amended House Bill”). Section 2(a) of this Bill provided:

“Sec. 2. Relief from portal-to-portal claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey and the Bacon-Davis Acts:

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act or the Bacon-Davis Act on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activities of an employee engaged in prior to the date of enactment of this act, except those activities which were compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

For the purposes of this section, no judicial or administrative interpretation of the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act shall have the effect of changing any written or nonwritten contract between the employer and employee so as to make compensable any portal-to-portal activities (as defined in section 5); nor shall any provision of any such contract, incorporating by reference as a part thereof such judicial or administrative interpretations,

make compensable any such portal-to-portal activities.”

93 *Cong. Rec.* 2454 (March 21, 1947).

The Senate Amended House Bill passed the Senate, but was rejected by the House. It was then referred to a conference of the two houses, which wrote the bill that was passed by both Houses and is now before the Court. The conference report to the Senate is found in 93 *Cong. Rec.* 4501-4502 (May 1, 1947). The Report of the Conference Committee, in Section 2(a), relating to existing claims, adopted in substance the provisions of Section 3 of the House Bill and Section 2(a) of the Senate Amended House Bill.

(2) DEBATES ON THE CONFERENCE REPORT ON THE BILL
ADOPTED BY BOTH HOUSES.

*Excerpt From Senator Wiley's Presentation to the Senate
of the Conference Report.*

93 *Cong. Rec.* 4501 (May 1, 1947):

“Mr. President, the conference committee adopted in its report the provisions of both the House and Senate versions of House bill 2157, in substance, with respect to past claims. In other words, the conference report in relation to past claims, adopts the theory of both the Senate and the House versions of the bill

* * * * *

“Mr. President, that is all I have to say in regard to the conference report, except to compliment the conferees, who worked like yeomen, night and day, until finally their minds met and agreement was reached on what I consider to be a constructive piece of legislation, which will result in advancing the economic health of this Nation.”

93 *Cong. Rec.* 4501 (May 1, 1947).

Excerpts From Statements of Mr. Hinshaw and Mr. Walter During Discussion in the House on the Report of the Conference Committee.

93 Cong. Rec. 4515 (May 1, 1947):

“Mr. Hinshaw. The gentleman remembers the cases known as the stand-by cases which were brought out before his committee in which certain employees might be called upon at some time not during their regular working time to perform some duty and that many suits for wages have been instituted under that type of claim. Is that provided for in the present bill?

“Mr. Walter. Yes; we feel that under the language of section 2(b) of this bill that type of arrangement is covered and that the employer is not liable.

“Mr. Hinshaw. The case I had in mind was one where there were certain persons who were left to guard electrical distribution stations where they were given a house and so forth and perhaps performed one or two labors per day and yet were paid on a monthly basis. Large suits were brought for time and a half for an additional 8 hours per day pursuant to the ruling of the court.

“Mr. Walter. We hope that we have met that situation and all of the situations that have been brought to our attention, because we had in mind that all of these portal-to-portal suits are in the nature of windfalls. None of the plaintiffs—and I say that advisedly—ever felt they were entitled to compensation for activities which are the basis of these suits. I think I should add to what I said about the defense of good faith.”

93 Cong. Rec. 4515 (May 1, 1947).

*Excerpts From Statements of Mr. Gwynne and Mr. Pace
During Discussion in the House on the Report of
the Conference Committee.*

93 Cong. Rec. 4514 (May 1, 1947):

“Mr. Pace. It was not entirely clear to me on the portal-to-portal pay what was done with the future handling of those claims that immediately precede the moment of employment, not the walking and the riding, but the preliminaries to start work. What position did the committee of conference make of that type of claim?

“Mr. Gwynne of Iowa. That type of portal-to-portal claim is barred. *In existing claims, the entire thing is barred*, even though the so-called portal-to-portal claim may arise in the middle of the day, during the hours for which the man is employed. In future claims riding or walking or travel to the principal place of employment is barred, and barred with it are preliminary activities and postliminary activities.

“Mr. Pace. Even though it involves the laying out of work the man is going to undertake in the next few minutes, the laying out of garments to work on, that claim would be barred?

“Mr. Gwynne of Iowa. It is barred *unless there was an agreement or custom to pay for it*.

“Mr. Pace. Does the gentleman think that should be handled through collective bargaining?

“Mr. Gwynne of Iowa. No. The whole thought is that those claims *are all barred*, I mean as to existing claims as to activities for which the employer has not agreed to pay.

“Mr. Pace. I understand that, but I mean in the future; it is barred in the future unless there is an agreement between the employer and the employee?”

“Mr. Gwynne of Iowa. *An agreement or custom.*”
93 Cong. Rec. 4514 (May 1, 1947).

*Excerpt From Statement of Mr. Michener in Reporting
the Conference Bill to the House.*

93 Cong. Rec. 4513 (May 1, 1947):

“The first part of the bill has to do with existing portal-to-portal claims which you will recall are defined as causes of action or claims seeking pay for activities which activities at the time they were performed were not compensable, *either by custom or practice in the place of employment, or by contract between the employer and the employee or his representative.*

“The bill as it comes from the conference *bans all existing claims of such character.*

“It provides that the courts have no jurisdiction to to entertain suits or enter any judgment whatever in this type of case. That is substantially the same as the original House provision.”

93 Cong. Rec. 4513 (May 1, 1947).

*Excerpt From Statement of Senator McGrath Opposing
the Report of the Conference Committee.*

93 Cong. Rec. 4501 (May 1, 1947):

“But I wish to call the attention of the Senate and of the country to the fact that this measure goes far beyond the field of portal-to-portal legislation.”

93 Cong. Rec. 4501 (May 1, 1947).

(3) EXCERPTS FROM DEBATES ON THE SENATE AMENDED
HOUSE BILL.

*Excerpt From Remarks of Senator O'Mahoney Before
the Senate in Opposition to the Senate Amended
House Bill.*

93 Cong. Rec. 2434 (Mar. 21, 1947):

In referring to a section of that bill substantially identical to Section 2(a) of the Portal Act as enacted, Senator O'Mahoney said:

"I call attention to the phrase in line 5, of page 11, 'on account of any activities.' If that means anything, it means precisely that there shall be no compensation with reference to minimum wage, or for overtime in connection with any activity—not simply any portal-to-portal activity because the phrase 'portal-to-portal activities' is not used; it says 'any activities'—unless those activities come within the exception set forth in clauses 1 and 2."

93 Cong. Rec. 2434 (Mar. 21, 1947).

*Excerpts From Remarks of Senators Cooper and Barkley
Before the Senate During Discussions of the Senate
Amended House Bill H. R. 2157.*

93 Cong. Rec. 2428-2429 (Mar. 21, 1947):

"Mr. Cooper. I think the distinguished Senator knows that I am always impressed by his remarks. However, I gathered from the illustration which he propounded that there was a question in his mind as to what would be the status of an employee who was required to report for his work some time before the beginning of his regularly scheduled hours to perform certain activities, and whether or not he would receive pay for such activities. Is that correct?

“Mr. Barkley. That is correct, subject to the further observation that, of course, if he has a contract, either written or unwritten, or if there has been a practice or custom—whether it is immemorial or short-lived—he would be entitled to pay. But without a contract, either written or unwritten, and without a custom having prevailed or a practice having been indulged in in that plant, in the future he would not, as I understand, be entitled to recover, because that work would be regarded as portal-to-portal activity, compensation for which is sought to be barred by the bill.

* * * * *

“Mr. Barkley. I thank my colleague. However, I get the very strong impression, if I am mistaken I wish to be corrected, from reading the bill and the report, and listening to the discussion, that under the definition of portal-to-portal activities, unless there is a contract, written or unwritten, or a custom under which such activities are compensable, all preliminary and postliminary work required by an employer is noncompensable.

* * * * *

“Mr. Barkley. It is necessary to go from the section which undertakes to define portal-to-portal back to section 2 to find out what the authors are talking about; and when we get back to section 2 we find that portal-to-portal *means anything which is not covered by contract or by custom or practice.*”

Excerpt From Remarks of Senator Cooper Before the Senate During Consideration of the Senate Amended House Bill.

93 Cong. Rec. 2372 (Mar. 20, 1947):

"I stated that it was the understanding and belief of the committee that probably no bill could be written affecting existing claims which would not impose some inequities. It becomes a matter of balancing interests or balancing the necessity of eliminating and invalidating this large volume of portal-to-portal claims which I believe everyone admits should, in the public interest, be invalidated against an unknown and undetermined inequities which might result from the committee bill or from the pending amendment. As an example I stated that prior to the enactment of the Fair Labor Standards Act an employee in a garment factory had periods of inactivity during the day. She might have a contract which provided that she should receive compensation only for actual work performed during the day, and she would not be paid for the periods of inactivity. But after the enactment of the Fair Labor Standards Act the interpretation of the Wage and Hour Administrator was that she should receive such pay. Obviously, under our bill or under the amendment, if she had not previously received payment for such periods of inactivity, she would not be able to assert a claim for pay for similar periods, worked prior to the enactment of the pending bill, unless covered by contract or custom."

93 Cong. Rec. 2372 (Mar. 20, 1947).

Excerpt From Statement of Senator Cooper Before the Senate During Consideration of the Senate Amended House Bill.

93 Cong. Rec. 2370, 2371 (Mar. 20, 1947):

"Since this debate started the senior Senator from Illinois [Mr. Lucas], the Senator from Massachusetts [Mr. Lodge], and the Senator from Vermont [Mr. Aiken] have propounded questions to this effect: In providing as to existing and past claims that no activity shall be compensable except by custom or contract, does the committee bill go further than that? Does the committee bill strike down and make noncompensable some activities which have been compensable under the Fair Labor Standards Act prior to the Mount Clemens decision?

"I shall be perfectly honest in answering that question in the Senate today. I say that that question must be answered in the affirmative, because when we provide that no activity shall be compensable except by custom or contract, it is certain that there have been activities performed in past years, within the statute of limitations, which were not under custom or contract, and yet were made compensable under the Fair Labor Standards Act."

* * * * *

"Under the bill as reported by the committee the true portal-to-portal time, payment for which was first allowed in the Mount Clemens case, would not be compensable. Again, some of the activities which, prior to the enactment of this bill, had been held under interpretations of the Wage and Hour Administrator to be compensable, would also be excluded. Finally, *the only claim which could be pursued to judgment under the committee bill would be a claim involving activities under custom or contract.*"

93 Cong. Rec. 2370, 2371 (Mar. 20, 1947).

Excerpt From Argument of Senator Wherry Before the Senate in Favor of the Senate Amended House Bill.

93 Cong. Rec. 2269 (Mar. 18, 1947):

"These three decisions [*Tennessee Coal Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U. S. 590, 88 L. Ed. 949, *Jewell Ridge Coal Corporation v. Local No. 6167*, U. M. W., 325 U. S. 161, 89 L. Ed. 1534, *Anderson v. Mt. Clemens Pottery Co.*, 328, U. S. 680, 90 L. Ed. 1515] have completely distorted the congressional intent as the dissenting judges in those cases, as well as the judges in the lower courts, have forcibly pointed out. Thus, in the Tennessee Coal and Iron case, Mr. Justice Roberts, who was joined in his dissent by Chief Justice Stone, stated:

" 'The Fair Labor Standards Act was not intended by Congress to turn into work that which was not work, or not so understood to be, at the time of its passage. It was not intended to permit courts to designate as work some activity of an employee, which neither employer nor employee had ever regarded as work.'

"Justices Roberts and Stone characterized the Court's decision in this case by quoting the words of Judge Sibley, who had dissented in the circuit court of appeals—

" 'The injustice of * * * is shocking.'

"These three decisions, and particularly the decision in the Mount Clemens Pottery case, have had disastrous results. The Fair Labor Standards Act was passed by Congress for two specific purposes:

"The first was to require employers to pay employees a decent minimum wage for their work.

"I certainly am in total agreement with that provision.

“The second purpose was to discourage excessive hours of work by requiring employers to pay overtime after 40 hours of work in any one workweek.

“The Congress obviously intended that the question of what was work was to remain exactly as it was before the act was passed, and merely to require that such work be compensated in accordance with the minimum wage and overtime provisions of the act.

* * * * *

“The House bill simply provides that there shall be *no liability for so-called portal-to-portal activities in the past or the future*, except where such activities are required to be paid for, *either by contract or custom or practice*. *I think that is a short, positive statement of what the bill provides—and it provides it all the way around the clock.*

“The Senate bill takes care of the portal-to-portal problem as to the past, but it does not fully take care of the problem for the future.”

93 Cong. Rec. 2269 (Mar. 18, 1947).

Discussion Between Senators Tydings and Donnell Before the Senate During Consideration of the Senate Amended House Bill.

93 Cong. Rec. 2196-2197 (Mar. 17, 1947):

“Mr. Donnell. I dislike to interrupt the Senator, but, in the interest of accuracy, we say that if there is a custom or practice, not inconsistent with the contract of the individual, under which custom or practice payment was made for certain activities, the employees shall be entitled to compensation for them, whereas we provide conversely that in the absence of such custom or practice, they shall not be so entitled.

“Mr. Tydings. Particularly, I think the committee makes this broad approach—and I ask the Senator to correct me if I am wrong—that if payment has been made in the past as a matter of custom, or if payment for portal-to-portal activities is provided for in the contract, the committee bill makes no change, and does not prescribe payment for work in either of those two categories.

“Mr. Donnell. That is correct.

“Mr. Tydings. It is in the ‘twilight zone,’ so to speak, where payment has not been made in prior practice, and where payment is not provided for in the contract, and therefore the question arises as to whether or not in good faith the employer and the employee assume that payment could be made under the Wages and Hours Act, in that twilight zone? That is primarily I believe the place from which most of these suits have sprung, from the twilight zone, rather than practice or contractual obligation; and it is particularly in that twilight zone that the committee is attempting now to legislate to clear up that matter. Is that a broad statement of the situation?

“Mr. Donnell. I appreciate that one man may use an expression differently from the way another man uses it. I do not regard it as a ‘twilight zone.’ I should say that recognizing the grave economic problem, what we do is to *undertake to wipe out all pending portal-to-portal cases, so far as it is humanly possible to do so*. In order to do that, we find it necessary to provide that any activity which is not compensable, either by contract, or by custom or practice not inconsistent with the contract, shall not be compensable. Does that answer the Senator’s question?

“Mr. Tydings. That pretty well answers it, because, although I take it the committee might like to have considered each case all over the country on its merits, in the nature of things it had to take action,

and the fairest way it could act in the interest of employer and employee was to take the cases that came in the real category of right, and put them to one side, and in all the questionable cases, as to who was right and wrong, which were not covered by contract or were not covered by prior practice, the committee said, 'We will knock all these out, because it is impossible to run a line through all of them with exact justice.'

"Mr. Donnell. I think the Senator has very clearly stated the situation."

93 *Cong. Rec.* 2196-2197 (Mar. 17, 1947).

(4) EXCERPT FROM DEBATES ON THE HOUSE BILL.

Excerpt from the Minority Report on the House Bill to the House of Representatives, From Its Judicial Committee.

93 *Cong. Rec.* A975 (Mar. 10, 1947):

"The bill reported favorably by the majority proposes to bar for the past and the future any action based on the failure of an employer to pay legally required compensation for any specific activities if those activities are not required to be compensated by the 'custom or practice' of the employer or by agreement between the employer and his employee or between the employer and a collective-bargaining agent.

* * * * *

"We would favor a provision writing into the law a definition of 'work'. Such a provision would require that in order to be deemed compensable under the law activities must be conducted under the control, direction, or requirement of the employer and must be primarily for the benefit of the employer."

93 *Cong. Rec.* A975 (Mar. 10, 1947).

II.

Excerpts From Depositions of Appellants Cited or
Referred to in Appellee's Brief.

(1) PRIMARY SERVICEMEN.

J. D. BORDEN.

[P. 10, lines 6-20]:

Q. I am limiting my questions entirely to the time that you became a permanent primary service man. A. I see.

Q. Now at that time, as I understand it, there were two shifts, one from 7:00 until 3:30 and one from 3:30 to 11:00? A. One from 3:00 to 11:30 at that time.

Q. And one from 3:00 to 11:30? A. Yes. It has been changed twice since then. There is a slight variation since that time.

Q. Do you recollect now which shift you worked on; or did you work on both of them?

A. We alternated all the way through. To begin with, we alternated every four weeks, and now we alternate every four or five weeks as the case may be.

[P. 11, lines 15-26]:

Q. Now, when you were on shift from 7:00 to 3:00—or 3:30 did you say? A. 7:00 to 3:30, yes.

Q. And then from 3:00 to 11:30? A. Yes.

Q. What time off was allowed you for lunch on your first shift? A. Well, they never set a definite time on either shift for the lunch period. They just said any half-hour period that we were free we could eat lunch.

Q. You were allowed a half-hour? A. That is right, yes, sir.

[P. 16, lines 9-26]:

Q. Now, what do you mean by your standby? A. That is time that I stand by at home by the telephone to

take any emergency orders which might come over the phone and which I would be required to take care of.

Q. Well, were you required to stay at your home? A. Yes, sir; I was required to stay at home. In fact, long before I became a permanent appointee, when I was doing relief work, I was told to get a telephone so that I could be able to stand by.

Q. Weren't you also told that if you went to anybody else's house or place to leave your telephone? A. I was never told that. I understand they did it in some districts, but I was never given permission to do that.

Q. Was anything ever said about that? A. No, sir, not to me.

Q. Was anything ever said one way or the other on it? A. Not to me, no, sir.

[P. 19, lines 16-26]:

Q. Was there any discusison at all about overtime when you took this position, or the salary that you were getting as a trouble man? If you don't recollect, you can say so. A. I don't remember, but it was understood that I was still to get time and one-half for any overtime worked, any call-outs that I was called out on.

Q. You didn't understand, when you went to work, that you got any overtime for any standby unless you were called on to perform some actual service, did you? A. No, sir; only for actual service called on.

[Pp. 20/22, lines 16/3]:

Q. By Mr. Sterry: Let me put it more simply. You received a salary of \$225 a month, didn't you? A. That is right.

Q. And you understood that was all you were going to get unless you actually did something after your eight hours of work? A. Yes. I was given to understand

that that would be all I would get unless I got overtime which I would be called on for.

Q. That is what I am getting at. You didn't understand that you would get anything for that standby time if you didn't have any trouble call? A. No; I wasn't told that I would or wouldn't in that case.

Q. Well, I know; and you never did get anything for it, did you? A. No.

Q. As a primary service man you made out your own time cards, didn't you? A. Yes; we made out our own time sheets. They were carried for a half a month each.

Q. You didn't make a daily time card? A. We posted our time on a time sheet for a half a month at a time, and then balanced it up and turned it in.

Q. At the time you started permanently as a trouble man, or primary service man, you would show any overtime for any services you performed after eight hours on that time sheet, wouldn't you? A. That was put on a separate time sheet. We had an overtime sheet and a regular time sheet. The overtime was on a separate sheet for the half-month.

Q. Well, on your overtime sheet you put on all the actual services that you performed after eight hours? A. That is right; yes.

Q. And you got paid for all of them? A. We got paid for all that was on that sheet, yes, all that I did.

Q. Did you ever make any claim for overtime that wasn't paid you? A. I don't believe I did, no, sir.

[Pp. 25/26, lines 15/1]:

Q. How did you compute your overtime; your hourly rate? Were you given a figure? Did anybody give you a figure for that? A. The E. D. S. office. I believe they got their instructions from uptown. We have three or four methods of computing time. We have, naturally,

a flat \$225 monthly salary which covers our regular shifts. Then that is computed against work orders, and so on, at a variable hourly rate which, of course, doesn't affect my salary of \$225, and I don't suppose it has any bearing on the case—I am just mentioning it in passing—but what does have a bearing is that we have an overtime rate of \$1.95 an hour for time and a half, and then we have a holiday rate which is \$1.2980.

[Pp. 27/28, lines 19/7]:

Q. Five days a week, yes, if one of those days falls on a company holiday and you work it, you get this extra compensation for the hours you work? A. Yes, sir.

Q. At this rate of approximately \$1.30 an hour? A. If I work a holiday in addition to my \$225 I get approximately \$10.40 additional pay.

Q. That would be for an 8-hour day? A. Yes, sir.

Q. Have you ever worked less than eight hours on a holiday? A. Well, if I did, it was allowed as an 8-hour holiday.

Q. It was? A. Yes, sir.

[Pp. 39/40, lines 2/3]:

Q. Now, you spoke about having one hour standby time in the morning from 6:00 a. m. to 7:00 a. m. Actually, of course, it wasn't quite an hour, was it? You spent part of that time going to your garage or to the station? A. That is right, yes.

Q. Also, as I understood you to say, they explained it on the theory that they thought, in order to be at the station by 7:00, you would be up by 6:00 and getting you breakfast, and it would be more convenient to have you called than to wake the other man up. That was the reason they gave? A. That was the reason they gave me for changing that, yes.

Q. I suppose, as a matter of fact, they were correct, that in order to be there at 7:00 you had to be up by 6:00? A. I was generally up by 6:00 anyway before that order came out.

Q. And you would go on about as you naturally did unless you got a trouble call during that hour before you left the house? A. That is right.

Q. If you got a trouble call and responded to that before going to the station— A. Yes; even before I ate my breakfast, if necessary, and it usually was.

Q. Well, did you put in overtime for that? A. Yes, sir. During that hour we got overtime if we were called out.

[Pp. 41/42, lines 21/1]:

Q. Do you know whether or not they had these bulletins filed in a bulletin book? I am talking about at the station. A. The E. D. S. office had a bulletin on the hourly rates that I explained to you. The clerk showed that to me to show me what my hourly and overtime rate and holiday rate was; but it was never posted on the bulletin board that I know of.

[P. 45, lines 16-19]:

Q. But still you don't get paid for any of that standby time, except the time you actually leave your home to go out on duty? A. That is right; just what I am called out on.

[Pp. 47/48, lines 19/11]:

By Mr. Sterry:

Q. Mr. Borden, when your daylight active shift was up and you went home, you could do as you pleased so long as you or your wife remained where a telephone call would reach you. Isn't that correct? A. You mean on the nights when I didn't have standby or when I did?

Q. When you had standby you went home, ate your dinner, conversed with your family and did anything you wanted to that didn't take you away from your house?

A. Yes; I did as I pleased unless I was called out. I could sit there and listen to the radio as long as it didn't interfere with the telephone calls. As long as I was within hearing distance of the telephone I could do as I pleased.

Q. Or if you stepped out at all, as long as a member of the family was there and could hear the telephone and call you? A. Yes. If I went out to the garage the wife took the calls and called me in so I could answer them.

W. H. CULBERTSON.

[P. 5, lines 1-12]:

Q. What were your hours of work? A. From 8:00 to 5:00 with an hour at noon.

Q. You mean 8:00 in the morning? A. Until 5:00 in the evening.

Q. And you had an hour off for lunch? A. An hour off for lunch.

Q. Where did you live? A. I lived on Santa Paula —Santa Barbara Street.

Q. The company didn't furnish any residence? A. No.

Q. You had your own? A. I had my own home.

[Pp. 8/9, lines 9/2]:

Q. What about your quitting time? You were supposed to quit at 5:00 at night? A. We were supposed to quit at 5:00 o'clock at night.

Q. Where; at the garage? A. At the garage.

Q. Suppose you were out on the job far enough away so that you got through with your work at 5:00 and it

took you a half hour to get back to the garage? A. We got overtime for everything after 5:00 o'clock, or any trouble call we got at night.

Q. Let's not come to that right now. What I am talking about is this: If your work was through, you had actually done all the repairing at 5:00 but you are out on the line so you were delayed getting back into the garage, you got overtime for that? A. We got overtime.

Q. And you say you got overtime if you were called out at night? A. Yes.

[P. 9, lines 16-20]:

Q. You don't mean by that you got a call every night? A. No.

Q. But that some nights you would get two or three and then there would be a time when you wouldn't get any? A. That is right.

[Pp. 11/12, lines 20/16]:

Q. What do you mean by being on 24-hour call? A. Well, I had to stay at home by the phone. I had to be where they could reach me at any time by telephone.

Q. Weren't you simply instructed that if you left your home that you were to leave your number where they could get you? A. Well, who would answer the phone if I was gone?

Q. Well, answer my question: Weren't you allowed to leave your house if you left your telephone number? A. Well, they would have to know where I was at.

Q. Well, all right. Did you have any way of letting them know where you were? A. I would call the Saticoy sub or the Fillmore sub. That is where we get our calls from when we weren't down at the garage.

Q. What instructions did you have about either staying at home or leaving telephone calls where you could be

reached? A. You were always supposed to be reached by the telephone or they knew where you were at all the time.

Q. Did you have any written instructions on it, or were you simply given that instruction by some superior?

A. The superintendent.

[Pp. 12/13, lines 25/8]:

Q. Now, tell me in substance what he told you about either not leaving your home or leaving a telephone number when you did leave your home? A. Well, it was the job. That was the job.

Q. Well, that may be more or less a conclusion that the court will have to decide. What I am asking you is what he said to you. I don't mean the exact words, but what did he tell you? A. He wanted to know where I was all the time. That is the one thing. I had to be by the phone.

[P. 13, lines 17-18]:

A. He always told us to always call Saticoy when we were going out on a call.

[Pp. 14/15, lines 25/7]:

Q. Well, what he told you was that you always had to be where there was a phone, whether you were in your house or some place else? A. Where they could get in touch with us.

Q. And if you went out of your own house, to leave word where they could reach you? A. All the time.

Q. I say is that the substance of what he told you? A. Yes.

[P. 22, lines 1-4]:

Q. As I understand it, after 5:00 in the evening and before 8:00 in the morning you had nothing to do for the

company except answer a call when you were called?

A. Whenever we were called on trouble, that is all.

[Pp. 22/23, lines 14/3]:

Q. How did you get your overtime? You spoke about your regular hours and overtime for everything beyond your regular hours. How did you get your overtime?

A. Oh, we knew the hours that we worked.

Q. I know that; but I mean how do you make any record of it? A. We have a daily time sheet and put our time down every day.

Q. And on that daily time sheet you have—A. A place for overtime.

Q. —a place for your overtime and a place for your normal time? A. Yes.

Q. And that is supposed to show the number of hours you work every day? A. Yes, sir.

[Pp. 23/24, lines 24/7]:

Q. You always signed your own? A. I always signed my own time sheet.

Q. You never put down any overtime that you didn't get paid for, did you? A. No, sir.

Q. And insofar as you knew, you put down all of the overtime you did perform, didn't you? A. I tried to.

Q. At any rate you didn't intend to overlook any? A. No.

[Pp. 28/29, lines 22/6]:

Q. Either as a lineman or as primary service man, you computed your overtime from the time you left your house, did you not? A. Yes.

Q. In other words, if at 9:00 o'clock at night you have a call, you would get up and start out for it, and if it was 12:00 before you got back home, you would charge the full time from the time you left your house until you

returned to your house? A. We charge the full time from the time we left the house until we returned. That's the way I did it.

[P. 33, lines 10-14]:

Q. You either had to be home or if you went someplace you would have to be where they could get you on the public telephone and you had to tell your superintendent or Saticoy. Is that correct? A. That is right.

[Pp. 39/40, lines 26/9]:

Q. At any rate, you could live wherever you wanted to? A. Yes.

Q. It was not a company-owned house? A. No.

Q. You are a married man? A. Yes.

Q. With a family? A. Yes.

Q. You live there with your family? A. Yes.

[P. 43, lines 17-26]:

Q. You only put in for the actual time that you worked. Is that right? A. Yes.

Q. When you left your home and went out on an emergency? A. Yes; that is the only time.

Q. Why did you only put in for that time? A. That is what they told us to do.

Q. Who told you to do that? A. The superintendent.

[Pp. 44/45, lines 14/11]:

Q. To your best recollection did he tell you that you would or would not be paid while standing by to answer these emergency calls? A. Well, I don't know. Just in those words he didn't tell me.

Q. What was the substance of it? A. Well, it was just assumed that if we worked, we got paid for it; and if we didn't, we just stayed home by the telephone and waited for trouble.

Q. You are distinguishing then between the actual time you left your premises to go out to answer the call and the other time you didn't put in for? A. You didn't put in for that, no.

Q. Now, when you did go out to answer an emergency call how did you get paid? Did you get paid time and one-half? A. Time and one-half.

Q. Time and one-half your hourly rate? A. Yes.

Q. You had a regular hourly rate, did you? A. Yes.

Q. While employed as a primary service man? A. An hourly rate, yes; you have a regular hourly rate.

[P. 48, lines 11-16]:

Q. But you only got paid for the time you spent there in actual work, and didn't get paid waiting to answer that call? A. No.

Q. You did not? A. I did not get paid.

[P. 54, lines 11-21]:

Q. You always considered your salary as full payment for everything you did except this actual work you did out of hours for which you got overtime? A. Yes.

Q. Now, what was your salary as a primary service man; do you remember? A. \$220.

Q. Was it at that figure constantly all the time or was it raised? A. Well, it has been raised a little. It was \$185 and then \$190. You know, it was just raised along there.

A. L. HONNELL.

[Pp. 5/7, lines 24/23]:

Q. What are your working shifts now? A. My working shift now is from 8:00 o'clock in the morning until 5:00; and then the 16 hours standby. I go to work Tuesday at 1:00 o'clock and I work until the following Tuesday at 1:00 o'clock; that is, eight hours on the job and 16 hours standby, and then an additional five days up until Saturday. Then I have Sunday and Monday off.

Q. You have six days a week? A. We are working six days a week and I get time and one-half for the sixth day.

Q. Up until the government through whatever board it was that decreed the 48-hour week in Southern California, you only worked five days? A. Five days is all we worked. I don't know just when the company started on 48 hours.

Q. That is a matter of record, but I think we can all agree that you were required to work the sixth day when the government decreed this as a critical labor shortage area and put it on a 48-hour week. A. Otherwise we worked five days a week before that, or 10 days.

Q. Ten days? A. Well, we worked a 10-day shift; 10 on and four off.

Q. You split your weeks? A. That is right. Seven days on 24-hour call and three days, eight hours each.

Q. Let's confine ourselves to your regular eight-hour shift for a while. How long have you had the hours that you have had of 8:00 to 5:00? A. Oh, I don't know just the exact number of years, but it has been the last five or six years.

Q. That is long enough for me. There hasn't been any recent change like the other gentleman had? For the last four or five years you worked from 8:00 in the morning until 5:00 in the evening? A. That is right.

Q. Did you have a half hour or an hour off for lunch?
A. One hour.

Q. And you could take that whenever you wanted to with the limitations, of course, of work permitting? A. Yes. My regular lunch hour is from 12:00 to 1:00, but, it's just like you say, there are some days that I don't get it from 12:00 to 1:00 but I can go eat when I get clear.

Q. What I mean is: Did the company specify 12:00 to 1:00 for lunch? A. No.

Q. In other words, if you wanted to, you could take 1:00 to 2:00 or 11:30 to 12:30? A. Yes.

Q. Of course, whatever time you took might have to be changed if you got a trouble call? A. That is right.

[Pp. 9/10, lines 19/23]:

Q. Now, on this time that you refer to after 5:00 o'clock when you go home, what has been your instructions as to what you are to do then insofar as getting calls are concerned or answering trouble calls? A. When I go home I stay there and do whatever I want to around the place. I do my yard work, anything I have to do after 5:00 o'clock; and if I get a call, I take care of whatever it is. The substation calls me, and when I get through with the call I go home. I don't call him back because I have a two-way radio system in my car, and if they want me again they will call me back on the air; and if they don't have anything for me and can't get me on the air, they can always catch me at home.

Q. Well, have you had any instructions as to whether you should stay at home or if you went some place else leave your telephone number? A. Yes. If I want to go to Joe's house, providing he has a telephone, I in turn call the substation and notify them where I will be so in case they want to get hold of me they can.

Q. When you referred to Joe, you meant any one of your friends? A. That is right.

Q. That has been the custom for the last four or five years? A. Yes.

Q. Have you ever felt at liberty during that time on the days that you were receiving these calls, to go to a motion picture if they had a telephone in the picture house? A. I went to one or two but got called out so I gave that up.

[Pp. 18/19, lines 18/6]:

Q. How about your time cards; do you turn them in daily, monthly, semi-monthly or weekly or what? A. I have a 15-day period on my time sheets.

Q. What is your salary? A. \$225.

Q. \$225? A. Yes.

Q. Has it been that for the last three years? A. Yes, sir.

Q. You never received anything except that salary and the overtime that you put in? A. That's right.

Q. Have you ever put in any overtime that has been disallowed? A. No.

[P. 19, lines 11-20]:

A. We keep our own time, and every morning, if you have any overtime, it is taken to the superintendent and okayed by him.

Q. Did you ever have any time that he refused to okay? A. No, sir.

Q. He does that, I presume, just as a matter of form, doesn't he? That is, does he ever ask about it or does he just okay it? A. He knows what the trouble was and things like that and signs it. He never has questioned it.

[P. 22, lines 10-12]:

Q. You have been paid fully according to the time sheets that you have turned in? A. Yes, sir.

[P. 24/25, lines 25/22]:

Recross-Examination.

Q. By Mr. Sokol: I would like to ask you this question: Why haven't you put in this so-called standby time on your overtime sheet? Why haven't you asked for overtime on that? A. You mean standby after 5:00 o'clock?

Q. Yes. A. Well, I didn't think there was any use. I didn't think anybody got it.

Q. Well, were you told that you would receive compensation for that standby time? A. No; I wasn't told that I would receive any compensation.

Q. Were you told that you would only get paid for the times you left your home on duty? A. The only time that we would get paid for is the time that we left our home to go on call and take care of whatever emergency trouble arose.

Q. Who told you that? A. That was the superintendent's orders.

Q. In other words, did he or did he not tell you that you wouldn't get paid for the other time, the standby time? A. Oh, no, they wouldn't pay it at all unless we had a call.

JOHN M. SMITH.

[Pp. 7/8, lines 24/9]:

A. [*sic*] That's what I mean. Of course, your work may change it, but what I mean is, the hours are simply fixed from 8:00 to 5:00 with one hour off that you can take either as you please or as your work requires. Is that correct? A. Well, I suppose it would be. I was never told that.

Q. Were you told anything differently? I mean were you ever specified any particular time? A. They specified the hour off at noon.

Q. Well, I know, but "one hour off at noon" you could construe generally to mean from 12:00 to 1:00. A. Yes; that is from 12:00 to 1:00 at noon.

[Pp. 9/10, lines 20/16]:

Q. What was said, if anything, if you left your house, about leaving your telephone number? A. He told me if I got a trouble call and left the house to call Saticoy and Filmore and tell them where I was going and about as near as the length of time I would be gone, and I would call them as soon as I found the trouble and report it back.

Q. Well, that I don't think quite answers my question. Did he say anything about the fact that, for instance, if you went out to see some friends after 5:00 o'clock that you could leave your telephone number where you were? A. No. I guess he figured I never would go out, so he never told me.

Q. Did you ever go out? A. Not that way, no. They have tried to get me over the telephone a time or two and he would jump me the next day and say, "We tried to get you over the telephone," and I asked him

what time and he told me, and I told him he could check with Saticoy and he'd find that I'd been out on some trouble. When that happened, I figured it wouldn't do for me to go to the show or somewhere and let him catch me out that way, because he would catch me the next morning, "Why didn't you answer the phone?"

[P. 14, lines 4-9]:

Q. At all times while you were a primary service man you were receiving a salary of \$225, as I understand it. A. Yes.

Q. Then you were paid time and one-half for anything you actually did after your regular hours? A. Yes; when we were called out to work.

[Pp. 14/15, lines 24/16]:

Now, to save Mr. Sokol a question—I don't know that I will—you didn't get any overtime except for actual service that you performed. Is that right? A. All the overtime I ever got was if I was called out. The time I was gone, why, I got overtime for.

Q. As a primary service man you made out your own time cards? A. Yes; I made out my own time sheets.

Q. You put in for all your overtime as you figured it? That is, you figured it, didn't you? A. Yes.

Q. And you were paid for all of it? A. I was paid for all of it. I never turned in any that I didn't get paid for.

Q. In other words, nobody ever questioned what you turned in for overtime? A. No, sir. I would make out my time sheet, make out my overtime, and take it in and get Mr. Schlinger, the superintendent, to sign it.

[Pp. 19/21, lines 2/12]:

Q. Did anyone tell you that you had to be available there to answer that phone? A. Sure.

Q. Who told you that? A. Schlinger told me that. That is what I was saying a while ago.

Q. If that was the case why didn't you put in for the time that you were waiting at home to answer those calls? A. Well, I didn't figure there was any use. Nobody else ever done it.

Q. Were you told at any time that you would not be compensated for the time that you were standing by waiting to answer those emergency calls? A. Well, I don't know as though I was told that when I took the job, but then everybody else had been doing the same way and, of course, I knew.

Q. You mean that is the custom and practice in the company? A. That is the way they had been doing for years, at least ever since I've been there.

Q. Not to pay for that time? A. Yes.

Q. But you have been getting time and one-half for the time that you actually used in actual work on an emergency call? A. Yes.

Q. And that time and one-half has been based on what? Do you know how that is figured out? A. Yes.

Q. How you figure the average annual hourly rate? A. My overtime rate at \$225 was \$1.95 an hour.

Q. As I understand it then—

Mr. Sterry: I think, Sokol—I may be wrong because I haven't had time to examine them all—but I think they took the monthly rate and multiplied it by 12 and then divided by 52 times 40.

Mr. Sokol: Yes.

Q. But you did have an overtime rate of \$1.95 an hour? A. Yes; and then I would figure out my time.

I would have to figure every hour. I couldn't make my time sheet out for two and a quarter a month; I had to figure every hour. If it was two hours, it would be twice \$1.95.

Q. For the overtime? A. For the overtime.

Mr. Sterry: I don't mean to interrupt, but when you say \$1.95 an hour do you mean that that was your hourly rate or that is what the overtime amounted to?

A. I've got a book. I mean I get the schedule out of the book that is in the superintendent's office.

Q. By Mr. Sokol: The hourly rate for overtime you mean? A. Yes. \$1.95 is overtime, and our other rate varies, our regular time varies. It is not the same every month, but we have to figure it by whatever that rate is. I mean we've got to get that out of the book in the superintendent's office and figure for that rate.

Mr. Sterry: May I ask—I don't mean to interrupt, but I want to get it clear—was the \$1.95 what you were paid for overtime?

The Witness: Yes, for overtime. You see, we had two time sheets. My overtime was on one time sheet and my regular time on another one.

[Pp. 22/23, lines 22/6]:

Q. As I understand it then there would be some times when you would be standing by in your home waiting for a call and actually would not be required to go out and perform work outside of your home on your standby time. That would happen? A. Oh, yes, that would happen.

Q. And so you never got any money for waiting?

A. No.

Q. You never got any money for waiting around like that? A. Oh, no.

(2) SUBSTATION ATTENDANTS.

H. L. ANDERSON.

[Pp. 3/5, lines 18/1]:

Q. When you were hired by Mr. Short as an apprentice, what did he tell you about the job? A. He told me that the job would necessitate my staying on the property 24 hours a day; in relieving men in one-man substations it would be necessary to drive to a substation and arrive there at 8:00 o'clock in the morning, and remain there until 8:00 o'clock on the morning that my relief was finished; that the job would ultimately lead into one-man substation operator, or station attendant, as they were called; that I would live on the property, then, and have a cottage on the property, and be required to stay on the premises 24 hours a day until my scheduled day off, when the relief man would come in and relieve me and take over for that 24-hour period.

Q. Did he tell you anything about the duties on the job as a substation attendant? A. Yes. He told me that the duties entailed keeping up the grounds and equipment, trip testing, routine switching operations, and emergency switching operations.

Q. Did he tell you anything else about the job that you can recall? A. That is about all.

Q. Was anything said about salary? A. Yes.

Q. For substation attendant? A. Yes.

Q. What was said about that? A. He said that the starting salary would be \$120.00 per month.

Q. What was that to cover? A. Well, that was my wages for the job.

Q. The whole job? A. Uh huh.

Q. Did you say "Yes?" I mean he can't get the nod of your head on the record. A. Excuse me.

[P. 6, lines 6-25]:

Q. Were the duties substantially as they had been represented to you? A. That is right.

Q. What stations did you operate as a relief operator? A. Colonia and Fillmore.

Q. After going to Casitas, you were there until you moved to Big Creek? A. That is right.

Q. Now, you stated that the work became boring. What did you mean by that? A. The necessity of having to stand by and wait for cases of trouble and operations for periods other than my regular working period. Previously, I had been used to working an 8-hour day, and at the finish of that 8-hour day, I was free to do as I pleased. In this job it was necessary to remain within call, or, in fact, on the Company premises so that I could be there to answer any alarms, or telephone calls. Many times I wanted to go into town, go to a show, or visit the neighbors, and I was prevented from doing so by the necessity of having to be right there at all times.

[Pp. 8/11, lines 22/14]:

Q. What do you include in the term "active work?"

A. Switching and working on the equipment, upkeep of the equipment, cleaning and maintaining the station in its proper form, maintaining the grounds, hoeing weeds, mowing the lawn, watering the lawn, taking routine meter readings, reporting to the switching center three times a day, and any switching that was being done by the district or by Transmission that necessitated my operating the equipment.

Q. Do I understand that it is your estimate that on an average you spent eight hours a day in active work of that kind? A. That is right.

Q. That does not include your studying, or things of that kind? A. No.

Q. At the time you conversed with Mr. Short about the job, or talked with the Division Superintendent, was any estimate made at that time as to how much of your time at the station daily would be spent in active working time? A. No.

Q. Now, during this time that you were working as a substation operator, were you paid overtime for any work? A. I was.

Q. What work were you paid overtime for? A. For the sixth day in the week; and I believe on several other occasions at which time I had to operate the substation after 5:00 o'clock at night for long periods of storm, and so forth.

Q. On any other occasions? A. I don't believe so.

Q. How were you paid for the rest of the time? A. I was paid a monthly wage, which was based on an hourly rate. That hourly rate was derived from the number of working days in the month, and that was computed in a 40-hour work week.

Q. At the time you discussed this work with Mr. Short, who hired you, was the salary quoted to you on a monthly rate? A. A monthly rate.

Q. Did you make regular time reports on this job? A. I did.

Q. How often were they made? A. We made a daily time sheet for a while. I mean it was just shortly before I left that the system was changed to a weekly time sheet, but the greater part of the time we had a daily time sheet that was made, and we posted that to a monthly time sheet ourselves at the end of the month. Those were turned into the division office at the end of each month, both the daily and monthly time sheets.

Q. When you went to a weekly time sheet, did you post that daily or weekly? A. That was posted daily. The only difference was that it had sufficient space on it to take in all of the days of the week.

Q. On these overtime hours that you mentioned when you were paid overtime after 5:00 o'clock, was there a space on these forms to show that? A. Yes.

Q. By whom were those forms approved? Where did they go after you signed them? A. To the Division Superintendent or his clerk.

Q. Those were made on Company forms? A. That is right.

Q. Did you keep any other time reports, or make any other time reports while you were working as a sub-station operator? A. I did not.

Q. Who instructed you as to how to make out those reports? A. The Division Clerk.

Q. Who was he? A. Henry Lamb.

[Pp. 11/12, lines 23/17]:

Q. Will you tell us just what your instructions were on the first occasion? A. Well, I believe I was given a copy of a time sheet that had been filled out and posted in the operating instruction book. That copy was explained to me, the different lines on the copy, the days, marking "X's" for the days off, and so on and so forth, using the proper symbols and bringing it to the proper time. I was shown how to compute my hourly rate by taking my monthly time and dividing it and breaking it down into an hourly rate for that particular month per number of work days.

Q. What instructions were you given as to the filling in of the overtime section? A. On the overtime section we were told that any overtime that occurred, we were to

put it down in that section; that we were to charge an overtime rate, based on our average annual salary.

Q. What were your instructions as to on what occasions you were to classify your time? A. Our overtime was classified as the sixth day in the week; that is, over 40 hours in the week.

[Pp. 13/14, lines 21/1]:

Q. Where did you live while working at Casitas as a substation attendant? A. I lived right on the property.

Q. Was the house right on the substation property? A. Yes.

Q. How far from the station? A. I should say about four or five hundred feet.

[P. 14, lines 7-17]:

Q. Was the house furnished? A. No.

Q. You put your own furniture in there? A. Yes.

Q. Did you live there with your family? A. Yes.

Q. Do you have any children? A. Yes.

Q. How many? A. Two at the time I moved there, and one was born while I was there.

[Pp. 15/16, lines 21/17]:

Q. Were there any occasions during the daytime when you would be in the house, itself? A. Yes, I have gone in the house.

Q. Now, at the present time how do you spend your evenings? A. Oh, various ways.

Q. What do you mean? A. We go to a show occasionally.

Q. About how often will you go to a show? A. Possibly once a week; or visiting our friends, playing pinocle. That is one of our main hobbies. One evening a week I attended school, night school.

Q. What were you studying? A. Turbine design and operation.

Q. Did you take any electrical courses, either by correspondence, or otherwise, while you were there at Casitas?

A. Yes, I did.

Q. What school? A. American School of Electrical Engineering.

Q. About how much time did you spend on that? A. Oh, I was supposed to devote an hour a day to that. I am sorry to say that I didn't keep up quite that well with it, though.

[P. 18, lines 4-12]:

A. I confined my daytime reading to the reading of my instructions, reading blueprints, and so forth, at the station. I might say that I was trained by a man, or broken in on that station by a man who had quite a deep feeling of responsibility to the job. He left the station in fairly good order for me, and he more or less instilled a certain pride in keeping the place up; and in training myself in that job I tried to follow his methods, his schedules of work, as near as it was possible.

[P. 23, lines 5-8]:

Q. And each time one of those operations occurred, you entered it in the record? A. That is right. We also kept a daily log of each and every operation.

[Pp. 23/24, lines 16/2]:

Q. In the course of a normal day without trouble, however, you were not required, during any particular time of the day, to remain in the station? A. Well, at 8:00 o'clock in the morning, 12:00 o'clock noon, and 5:00 o'clock at night I was to be at the station; that is, in the station itself, to take meter readings and report them into the switching center.

Q. And on each occasion that took about how long?

A. Oh, 15 minutes in the morning, about the same at noon, and it took about a half hour at night; because the total energy consumed by the station, or passed through the station, had to be computed and turned in in a report at night.

[Pp. 26/27, lines 16/13]:

Q. How much time do you believe should be considered overtime on that job, the job that you had? A. I should say about six hours a day.

Q. How do you arrive at that figure? A. Well, I conscientiously put in eight hours a day at the station and on the grounds doing the work of the Company. I slept eight hours of the day. I would say that I took about two hours for meals, a half hour for breakfast, a half hour for lunch, and an hour for dinner at night. The remainder of the time was really not my own. I was under orders during that other six hours. In fact, I was under orders during my sleeping time; but I did sleep. I averaged eight hours a day sleeping, although there were times when I would have to answer the alarm bell at 3:00 o'clock in the morning, waking out of a sound sleep, diving for my clothes and making a dash into the station, check my trouble, analyze the work, go through my operation, and return back to my bed possibly a half hour or hour later, and be unable to sleep from then until daylight, because it just riles a person up. Your nerves are pretty well on edge on a job of that sort, at least mine were; but I do say that I did, on the average, get eight hours of sleep a night. The remainder of that time, which would be six hours, why, I spent waiting for trouble to occur.

[P. 28, lines 12-24]:

Q. Did you normally spend your evenings with your family while you were at the substation? A. Did I?

Q. Yes. A. Yes.

Q. During what periods did you read fiction and other light reading that you mentioned? A. In the evening.

Q. The early evening? A. I beg your pardon?

Q. Generally between what hours? A. Oh, between 6:00 o'clock and 10:00, 11:00 o'clock at night.

[P. 29, lines 3-8]:

Q. Did you have any other hobbies than those you have already referred to in connection with other questions? A. No. I was particularly interested in training myself to be an operator. I spent a great deal of time at that, trying to improve myself to better my chances for a higher job.

[P. 29, lines 19-20]:

Cross-Examination

By Mr. Sokol:

[Pp. 31/33, lines 24/18]:

Q. Well, now, you stated when you went to work, Mr. Short talked to you and told you about your monthly rate. However, after you went to work did you receive any written instructions with respect to whether or not you would be on a 40-hour week? A. Yes, I did.

Q. What were those instructions? A. The written instructions concerned our posting our time to our monthly time sheets on the basis of a 40-hour week. It was necessary for us to state at what time our work began and ended. Also that we were paid at so much per hour for 40 hours, and at so much per hour for the following eight hours on the overtime day, giving a total. That had to

be posted for each week in the month on the monthly time sheets.

Q. With respect to the overtime that you did put on the time sheets after getting approval, was that time and one-half after 40 hours? A. That is right.

Q. Time and one-half the hourly rate? A. Time and one-half the average annual hourly rate.

Q. Based upon eight hours a day? A. Based upon eight hours a day.

Q. Now, when the Government put us on the 48-hour week, you worked the sixth day, then? A. That is right.

Q. Previous to that you were working how many days? A. Five days.

Q. In other words, on the time sheet you showed five 8-hour days? A. That is right.

Q. Then when you went on the 48-hour week, you put down six 8-hour days? A. That is right.

Q. Did you ever put down this stand-by time when you were waiting to do your work? A. No, I did not.

Q. Why not? A. It wouldn't have been allowed to go through.

Q. Why do you say that? A. The precedent I don't know. That's all I can state.

Q. You were following written instructions that you were to be on duty for 24 hours a day, but that you were only to have a working day of 40 hours. Do you recall that specific instruction? A. Yes.

Q. You mean a working week? A. Yes.

[P. 34, lines 1-12]:

Mr. Woodbury: In this connection, Mr. Sokol, may I ask you to designate what you are referring to as stand-by time?

Q. By Mr. Sokol: You tell us what you consider stand-by time. A. I consider as stand-by time, any time after my dinner hour until going to bed, although we were required to get up during the night if an alarm rang. We were still on stand-by when we were asleep. The fact that we went to bed did not relieve us of the responsibility of being on stand-by. So, actually, your stand-by time was from 5:00 o'clock at night until 8:00 o'clock the next morning, and also during the lunch hour.

[P. 37, lines 1-10]:

Q. After 5:00 p. m. did the telephones ring? A. Yes.

Q. With any regularity? A. No.

Q. Well, within what space of time would they ring?

A. Well, they varied greatly.

Q. Did you get calls every night? A. No.

Q. Not every night? A. No.

EUGENE L. ELLINGFORD.

[P. 3, lines 8-10]:

Q. When you became a substation operator, who hired you for that job? A. Mr. L. L. Dyer.

[Pp. 3/5, lines 23/24]:

Q. Which one of those men told you about the work of being a substation operator? A. Mr. Garrison, Mr. L. L. Dyer, Mr. W. L. Dyer and Mr. H. L. Steck.

Q. They all told you the same story? A. That is correct.

Q. What did they tell you about the job, the nature of the job? A. They told me that I would be subject to anything that might be required; that I would be required to put in 24 hours a day; and that not to become discouraged because it was their policy to move the men up as they got the opportunity.

Q. By "moving them up" you mean from relief to substation attendant? A. To substation attendant, and from substation attendant to assistant operator or second operator at a major substation, and then on up.

Q. What did they tell you about the duties of the job; what work you would have to do on the job? A. Well, just routine and emergency operating, and keeping the place looking decent, the grass cut, the weeds cut down, and so forth. The Edison houses were on Company property, and we had to see that the weeds were cut down around the house, and so forth.

Q. Had you been a substation operator before coming with the Company? A. No.

Q. Did they tell you anything else about the mechanical active duties of the job that you were to do? A. Well, I can't seem to recall so very much, except that they told me that there was the taking care of Edison property, and that I was to be available in case any trouble came up at any time.

Q. Did they make any estimate or tell you anything about how much time during the day you would have to spend in these active duties? A. I believe they said it was customary to generally work about eight hours, and the rest of the time we stood by.

Q. Did they tell you that you would work actively for eight hours? A. No. In this one respect they said that they would prefer that we—well, let's see how they worded that. As near as I can recall, they worded it to the effect that they would like to have us in and about the station and vicinity, close-by, during the daytime in case some one should call. That is as near as I can recall at this time.

Q. What did they tell you, if anything, about how much time the job would require in lawn work? A. They made no mention of how much time that would require. In other words, in some respects, Mr. Steck, I believe, told me that some of the fellows used to get up at 5:00 o'clock in the morning and have all the work done by eight o'clock, and from then on his time was his own.

[Pp. 6/8, lines 24/26]:

A. They told me that I would start at \$100.00 a month, and out of that \$100.00 a month I would be required to pay the regular station attendant a cent and a half per kilowatt while I was on relief, and that I would be required to maintain my family outside of Company property.

Q. That was when you were hired as a relief operator? A. That is right.

Q. What did they tell you about the salary as a one-man substation attendant? A. They told me the salary of a one-man substation attendant would be—Mr. Garrison implied that after I had been with the Company a few months I would receive a raise in pay, and that I could look for a periodic raise until I got up to a certain amount.

Q. What amount was that? A. The prevailing wage for substation attendant, or substation operator, as they were known then.

Q. Was that to cover the whole job? Is that your understanding? A. The figure was given to me—in other words, I don't recall whether it was to cover the whole job or not, but I understood it was to cover the 8-hour

period, which was normally being shown on the pay roll at that particular time.

Q. Was it your understanding that you were to be paid anything in addition for this time that was not reflected in the eight hours? A. I received no pay for it. I will say that much.

Q. Was that your understanding at the time you took the job? A. I don't recall about that, but I know the only time I ever got paid when we were sitting around waiting for the alarm bell to ring was when it rang and the trouble was sufficient enough to warrant it.

Q. Do you recall what, if anything, was said about any overtime at the time you were hired, as to when you would get it, if at all? A. I didn't ask about overtime conditions. I left that up to the Company, because I was told they were a fair company to work for.

Q. Was your work at Los Alamitos and Anita, where you were a one-man substation attendant substantially the same kind of work at both places? A. Yes.

Q. Can you tell us just about what you do; and, if you can approximate it, about how much time each day is spent in your various duties? A. I couldn't approximate that, for this one particular reason, that now, like today, for instance, you gentlemen all come out here and I come over to work at about 7:00 o'clock in the morning to get out some of my paper work. I have been here ever since 7:00 o'clock—oh, maybe, two or three minutes after 7:00—doing various little things, cleaning up the sta-

tion, cutting a few weeds, and twiddling my thumbs for a while waiting for you fellows to come.

[Pp. 9/11, lines 10/26] :

Q. It varies, I take it, from day to day as to how much time you put in in active work. Is that right? A. We have to take readings from 8:00 o'clock to 12:00, and from 2:00 o'clock to 6:00 o'clock.

Q. Those are hourly readings? A. Yes, sir.

Q. How long do they take? A. About five minutes.

Q. On each hour? A. But in between times, why, we check transformers to see whether they are hot, check the temperatures.

Q. How long does that take you? A. Well, let's go out and do it.

Q. I mean you've done it. About how long does it take you to check them? A. Oh, about 10 minutes to check the motors and transformers, and so forth.

Q. How many times do you check them in a day? A. Every time I go by them. Sometimes we go by them every 15 minutes. I always stick out my hand and touch them to see if they are hot.

Q. How often do you make a record of those temperatures? A. We record that on the OD-98 whenever we take a reading.

Q. So on the hour you spend, if I understand your testimony, around five or 10 minutes taking a reading on your meters, and, maybe, five minutes in addition check-

ing your transformers? A. Then we rule up the log book in the morning, and that takes time. We have to check into the switching center; and, anything we want to know, we have to call in during the day. We spend periodic time studying over our emergency operating orders and our station instructions.

Q. Do you do that every day? A. Well, we have to, because there are always changes coming on. Mr. Moran will tell you that.

Q. About how much time during the day do you spend on that on the average? A. Well, it just depends on what else comes up. Now, like today, we may not get much of a chance to do that; but, maybe tomorrow, we might spend more time doing it.

Q. Let me ask you this: about how much time would you estimate that you spend during the day in what we will term active work duties; that is, where you are really doing some actual physical work? A. Well, we put in our time from 8:00 to 12:00 and from 2:00 to 6:00, and other time as required. If the electricians are here, we start in at 7:30 in the morning, and keep going on through until the electricians leave. After they leave we have to clean up. So, again, I say the physical labor varies. You see, we have to do all our own physical work and all our own paper work; and, in addition to that, be somewhat of a diplomat. People call us, and if they happen to have a blown fuse, it's nothing to spend 15 minutes trying to get the customer's service back to him when we

can't send a trouble man out. We try to pacify the customers, and keep up the satisfactory standards of Edison service.

Q. I appreciate that, Mr. Eillingford, [sic] but what I am trying to get at is some idea of an average day. If you can't, you say so. A. You can't call them an average day, my friend, because every day brings something different. We don't know how many times the trouble men are going to call out here and say, "Have you got anything for us?" or the Transmission men. Generally, when they are here, it has been Company policy for us to keep an eye on them to see that they don't do something they're not supposed to do. So, like I say, I wouldn't say what is average; but I do say we take our readings from 8:00 to 12:00 and 2:00 to 6:00.

[Pp. 12/15, lines 20/1]:

Q. Were you paid while you were at Los Alamitos and Anita, were you paid overtime for any work of any kind? A. Emergency operating only.

Q. What was your understanding as to what constituted emergency operating work for which you were to be paid overtime? A. The only way we got it was because we had to fight for it. The test case of it was when the Rancho 11 kv line relayed to Los Alamitos, and I had to get up out of bed and close the Rancho 11 kv line for test, and it relayed again; and upon doing that I called Santa Fe Springs and State Street Switching Center, and stated what happened. Santa Fe Springs happened to be

the switching center that handled the switching, and they told me to remain in the station; and I remained in the station, and I think I was there—I don't recall now just how long I was there—but Santa Fe Springs, anyway, got overtime and I didn't; so we protested to Mr. Cagner. A short time after that there was a letter come out giving us overtime for emergency operating, but not for stand-by duty.

Q. Under what conditions did those instructions specify that you would be paid? A. Emergency operating.

Q. Is that the phrase used, or did they define it, or describe it in any way particularly? A. Emergency operating is defined as—let's see—I believe our instructions define that as something that is abnormal like the switch kicking out or something that requires us to come over and do actual switching or emergency operating of any kind.

Q. How are you paid for the rest of the time? A. I wasn't.

Q. You received a monthly salary? A. I received a monthly salary that was computed on hourly basis for eight hours a day.

Q. Did somebody instruct you as to that computation? A. I don't get what you mean.

Q. Well, as I understand it, at the time you were hired you were informed of a monthly salary of so many dollars a month. A. It was stated to me that it was paid on an hourly basis for eight hours a day.

Q. At the time you were hired that was stated to you?

A. It was a monthly salary, but it would be computed on an hourly rate for eight hours a day.

Q. Who instructed you as to that? A. Mr. Garrison told me that up in the Personnel Office, and Mr. L. L. Dyer told me the same thing.

Q. Did you make regular time reports while you were acting as a station attendant at Los Alamitos and Anita?

A. What do you mean?

Q. Did you have any time record that you made out?

A. Yes. We call in at 8:00 o'clock, and took readings from 8:00 to 12:00 and 2:00 to 6:00.

Q. Did you make any daily record for the report of your time worked? A. We had what we called daily time sheets at that time. In other words, it was made out each day.

Q. I see; and what did you show on that? A. Eight hours a day.

[Pp. 15/16, lines 25/14]:

Q. Do you live with your family? A. I do.

Q. How many children? A. One.

Q. Is it a boy or girl? A. Girl.

Q. When was she born? A. July 14, 1936.

Q. Does she got to school around here? A. My little girl goes to Holly Avenue School.

Q. Do you, in the evening, have occasion to take care of the little girl at all? Do you play with her or spend

time with her? A. Well, whenever I am over at the house, I do.

Q. Your family is over there; they live there with you? A. That is right.

[Pp. 20/21, lines 9/2]:

Q. Now, was your wife well when you were working at the job with the Metropolitan Water District? A. Yes.

Q. And she has been well ever since? A. No, she hasn't.

Q. When was she taken ill? A. She took ill somewhere around about March, 1940, I believe.

Q. What was the nature of her illness? A. Do you want the medical report or the chiropractic report? I prefer the chiropractic report, because they are the ones that made her well. She was slowly gassed by natural gas.

Q. As a matter of fact, Mr. Ellingsford, isn't it a fact that you indicated to the Company you would like this kind of a job in order that you could take care of your wife during the daytime? A. Hell, yes; but it's a hell of a lot better than this 24-hour relief, and being away all the time. I told them I wouldn't stay with the Company, if I couldn't change.

[P. 21, lines 9-14]:

Q. It is also a fact, is it not, that you were able to spend time during the day taking care of your wife? A.

Yes; but I didn't get any overtime for that, either; I mean, for nights when I had to get up and answer the local phone like that. I managed to put in my eight hours a day over at Los Alamitos.

[Pp. 36/37, lines 1/10]:

Q. By Mr. Sokol: Let me ask you this question—I will interject here—were you on an hourly rate of pay?

A. Yes.

Q. How is that arrived at? A. I will show you, if I can get my file here, sir. This is the first thing. It's the hourly rate table for operating department employees.

Q. Just tell us how your hourly rate was arrived at. A. Here is this month, according to our schedule (indicating).

Q. Do you have a regular table for these? A. We have a regular table. Now, this time we have 21 working days in this month, so eight hours a day is 168 hours. Therefore, at my rate, which is \$180.00, my hourly rate of pay would be 1.0715 for 168 hours.

Q. In other words, they take eight hours per day? A. That is right; they take eight hours per day.

Q. In computing the hourly rate you are not given any allowance for stand-by time? A. That is right.

Mr. Woodbury: By whom is this prepared?

The Witness: Southern California Edison Company.

Q. By Mr. Sokol: Then for the overtime you get time and a half that \$1.07? A. No; for the overtime—you see, according to Form Edison 100, the annual hourly

rate is computed as follows: Monthly rate times twelve months equals the yearly rate. The yearly rate divided by 52 is the average weekly rate, and the average weekly rate divided by 40 hours is the average hourly rate.

Q. In other words, your hourly rate times time and one-half after 40 hours based on the average annual hourly rate? A. Yes; the average annual hourly rate times one and one-half is our overtime rate.

Q. Based upon 40 hours a week? A. That is right.
[P. 42, lines 15-20]:

Q. Did you ever put down your stand-by time after 6:00 o'clock, I mean, on this sheet? A. No. They told me not to.

Q. Who told you not to? A. Every chief clerk of every division I have worked in. They said stand-by time was not allowed.

Attached is Exhibit 1 introduced in the deposition as a sample of the weekly time sheet, Exhibit 2, the daily time sheet, and Exhibit 3, the monthly time sheet as made out, showing an exact eight hours per day for normal time, and the overtime work. [P. 41, lines 19-22, p. 42/43, lines 24/10.]

WEEKLY TIME SHEET
WORK-WEEK BEGINS AT 12:01 A. M.

WEEK - PERIOD EMPLOYEE - INITIAL

FORWARD SHEET TO OFFICE AT END OF WORK-WEEK OR MONTH, AT TIME OF TRANSFER, LEAVE OF ABSENCE, OR SERVICE TERMINATION

HOUR OFF
FOR LUNCH

A.M.
P.M.

A.M. TO

NORMAL WORK

[illegible]

PROVED

O.T. APPROVED

CHECKED & POSTED
TO FORM ED. 100

CERTIFIED CORRECT:

MEALS AT CO. EXPENSE
FOR HYDRO-GENERATION
DIVISION USE ONLY.

STATION CHIEF, FOREMAN, ETC.

SUPERINTENDENT

SIGNATURE OF EMPLOYEE

INDEX

DAILY OR
WEEKLY TIME SHEET

WORK WEEK BEGINS AT 12:01 A.M.

194

WEEK PERIOD EMPLOYEE—INITIAL			NORMAL WORK SCHEDULE		A.M. P.M.		A.M. P.M.		HOUR OFF FOR MEAL		
LINE	DATES	SHIFT	DESCRIPTION OF WORK		LOCATION		ACCOUNT OR JOB NUMBER		TOTAL HOURS		
1			NORMAL TIME								
2			<i>plan</i> <i>diff</i> <i>at 2</i>								
3											
4											
5											
6											
7											
8			OVERTIME						TOTAL NORMAL TIME		
9											
10											
11											
12			"H" COMPENSATION						TOTAL OVERTIME		
13											
14											
MEALS AT COMPANY EXPENSE. FOR USE ONLY IN GENERATION DIVISIONS.			DATE						FORWARD SHEET TO OFFICE DAILY. AT END OF WORK WEEK OR MONTH, AT TIME OF TRANSFER, LEAVE OF ABSENCE, OR SERVICE TERMINATION, ALL DAYS IN WORK WEEK SHOULD BE SHOWN. USE NOTATIONS. "REGU AR DAY OFF." "HOLIDAY." "ILLNESS." "VACATION." "OFF ON OWN ACCORD." OR OTHER REASONS FOR DAYS OR HOURS NOT WORKED.		
APPROVED			O.T. APPROVED		CHECKED & POSTED TO FORM EDISON 100		CERTIFIED CORRECT:		194		
STATION CHIEF, FOREMAN, ETC.			SUPERINTENDENT		TIMEKEEPER		PERIOD ENDED		SIGNATURE OF EMPLOYEE		

MONTHLY TIME SHEET

MONTH April

1942

PAY ROLL NO. 366

LOCATION Aruba Aruba

[illegible]

CERTIFIED CORRECT	MONTHLY RATE	DAILY RATE	VACATION FROM	TO	HOURS
<i>E. Ellingford</i>	1.675	180.75			
CHECKED AND APPROVED	AVERAGE ANNUAL HOURLY RATE	OCCUPATION	IN SERVICE	OUT OF SERVICE	TRANSFERRED
<i>E. Ellingford</i>	1.675	Station Chief			
	OVERTIME RATE AND ONE HALF	NAME			
		Ellingford, E.L.			
OFFICE MANAGER OR DIVISION CLERK					
OVERTIME APPROVED					

H. S. KANEEN.

[Pp. 2/3, lines 25/9]:

Q. By whom were you employed; by what representative of the Edison Company? A. I saw Mr. Garrison and Mr. Short, and Mr. Cavner, in the Main Office.

Q. What were your instructions with reference to the duties of the job you were undertaking to perform? A. I understood that the job consisted of looking after and operating electrical equipment in conjunction with the substations; that the working hours were to be from 8:00 in the morning until 12:00 noon, and from 1:00 until 5:00; that we were to remain on the premises thereafter.

[P. 5, lines 1-26]:

Q. Did they each instruct you on different branches of your work, or the nature of your employment? A. Mr. Garrison gave the preliminary interview, Mr. Short identified the nature of the work, and Mr. Cavner clinched it finally. In other words, he was the one who greeted me into the organization. Mr. Short was the one who spent most of the time telling me the duties of the job, and what was to be expected.

Q. Was your salary fixed at that time? A. The monthly salary was quoted.

Q. At what rate? A. \$110.00 a month.

Q. What was said to you with reference to where you were to live?

Mr. Sokol: Are you referring—

Mr. Cunningham: When he first went to work.

The Witness: No reference was made in regard to my personal home; however, it was stated that I would remain in the relief quarters while working at one station for a period of 24 hours each working day.

Q. By Mr. Cunningham: When you first came to work, you were working as a relief operator? A. That is right.

Q. When did you cease your work as a relief operator and become a regular attendant at a substation? A. I believe that was the 1st of February, 1942.

[P. 6, lines 15-24]:

Q. Now, what were your instructions with reference to how continuously you were to stay on the substation property, including the residence? A. Including the residence?

Q. Yes. A. Twenty-four hours a day.

Q. How many days a week? A. At the beginning it was five days a week, and later we went to six days a week, ahead of the rest of the system, on the Western Division.

[P. 7, lines 6-9]:

Q. Yes, I know; but in the various stations you worked at, after you became station chief, were the duties practically the same at each substation? A. Yes, they were.

[P. 12, lines 11-14]:

Q. Well, did you put in an average of eight hours every 24 hours in those active duties? A. Some days it would run quite a bit over that, and other days it wouldn't come to it.

[P. 16, lines 9-23]:

Q. So your statement is that you think you spent practically a full eight hours in active duties, based on your recollection of the nature of your work there? A. That and the fact of what was required.

Q. You mean to say that you had instructions that you were to be physically active eight hours a day? A. We were to be present on the station grounds and busy ourselves.

Q. Well, could you find enough work to do to keep busy eight hours a day? A. A station requires quite a bit of study; and if you call learning your equipment, where all of the various control circuits go, what to do in case of trouble, active duties, I should say most of it will occupy most of the time.

[P. 17, lines 16-24]:

Q. Can you give us any estimate of the amount of time you spent during the daytime on those studies and writing examination papers?

Mr. Sokol: You are now referring to the hours between 8:00 and 5:00?

Mr. Cunningham: 8:00 to 12:00 and 2:00 to 6:00 or 1:00 to 5:00.

The Witness: I don't see how I can pro rate any such figures mentally.

[Pp. 18/19, lines 15/11]:

Q. Did you ever do any vegetable gardening during the day? A. We had a vegetable garden on the cottage side, a small one.

Q. Did you raise enough vegetables for your family use? A. I believe not. We had a very nice case of nematodes up there.

Q. Well, what percentage of your vegetables did you raise?

Mr. Sokol: I don't believe he testified that he raised them. He said, "We had a vegetable garden."

Q. By Mr. Cunningham: You didn't do any work in the vegetable garden? A. During what time?

Q. During the daylight hours, generally? A. You can't very well do any work in a vegetable garden after dark.

Q. Did you do any work in your vegetable garden between the hours of 8:00 and 12:00, and 1:00 and 5:00?

A. Let's put it this way: I was required to maintain the grounds of both the cottage and the station, as part of my Company duties. Is there any difference between raising vegetables and raising flowers or grass?

[Pp. 21/23, lines 15/2]:

Q. By Mr. Cunningham: During the whole 24-hour period, outside of being present on Company property at the house or at the substation, did you have any other form of activity not required by the Company's instructions to you in connection with your duties as a station operator? A. Well, certainly.

Q. What were they? A. Being a normal human being, I ate and slept.

Q. Well, how much did you sleep? A. I don't sleep a great deal. I get by quite nicely on six or six and a half hours sleep.

Q. Each night? A. Yes.

Q. And that represented the normal time you slept, did it? A. I believe so. Pretty close.

Q. You ate three meals a day, I suppose? A. That is right.

Q. What else did you do? A. Other than the activities that had to do with eating and sleeping, outside of the preparation for eating and the preparation for going to bed and getting up, the time was pretty boring.

Q. How's that? A. I say the time was pretty boring.

Q. What did you do, if anything? A. Well, what are you driving at?

Q. I am trying to find out how you spent your time. How did you spend your evenings?

(Objection of counsel omitted.)

The Witness: A portion of the time was spent in reading.

[Pp. 23/24, lines 13/3]:

Q. Do you have any children? A. We have a boy.

Q. How old? A. He was born in 1942.

Q. Did you spend any time with him? A. I believe the normal amount.

Q. Helping take care of him? A. Nothing other than watching him and keeping him amused, and playing with him.

Q. Playing with him? A. And being with him.

Q. Did you receive at any time anything in addition to your monthly salary on account of any work you did between the hours of 8:00 a.m. and 12:00 noon, and 1:00 p.m. and 5:00 p.m.? A. When we started six days a week, the sixth day was paid at the rate of time and one-half.

[Pp. 26/27, lines 6/14]:

Q. As part of your duties, were you required to make any written reports regularly? A. That is right.

Q. What were they? A. I took daily readings on the hour during the normal scheduled working hours from 8:00 in the morning until 5:00 in the evening. I was required to make weekly battery checks and reports. I was required to write a monthly station letter, and to make out an operating report monthly.

Q. What with reference to time reports? A. We were required to make out our own time sheets.

Q. Did you make those out every day? A. They changed the forms on those. For a while we had a daily time sheet; then they changed it to a weekly time sheet. It was posted daily, however.

Q. Those time sheets show the hours worked? A. They merely state that we spent eight hours. I believe that was the form in which they wished to have them.

Q. Those hours were filled in by you? A. That is right.

Q. What hours did they tell you to show?

Mr. Sokol: Read the question.

Mr. Cunningham: I understood him to say he was given some instructions on that point.

The Witness: I believe the form had a place for the person's signature, the date and the nature of the work upon which he worked, and the number of hours spent at it. In other words, for any one day, say at Carpentaria, I gave the station name, "Carpenteria," the date and "Operating Substation, 8 hours." That would be totaled up at the bottom.

Q. By Mr. Cunningham: Would those hours show with reference to the time those hours spent occurred with reference to the clock? A. I believe up at the top it said from 8:00 till 5:00, but I will not swear whether it did or not.

[P. 30, lines 17-26]:

Q. Would you say that while you were in this substation work you spent more or less time with your wife and your son than you do since you came down to this job at the Steam Plant? A. I, very naturally, spent more time with them on that job, because of the nature of this job. This job involves shift work, which means that during the time the wife and child are normally

awake for one month out of six weeks, I will normally be asleep. I don't live the same hours that they do.

[Pp. 33/34, lines 1/25]:

Q. Getting back to a question I asked you some time ago about the time you spent in active work doing the duties assigned to you at the substation, you said you spent considerable time studying. If you eliminate the time you spent studying during the period from 8:00 until 12:00, and 1:00 or 2:00 to 5:00 or 6:00, what time would you spend in performing the actual physical duties assigned to you around the substation and the yard? A. I don't feel I can give any approximation of that.

Q. Well, you didn't spend all of the eight hours that way, did you? A. In active physical duties?

Q. Yes. A. No.

Q. Can't you give us a fair estimate of the time you spent in actual physical duties? I mean actual duties that required physical efforts. A. I think not. They were so diversified in nature. In other words, one week you might have a gang there and you would be working very regularly and steady, and for more than eight hours during the day; and the next week, why, you might be having inclement weather, and might have a good deal of time for reading and study.

Q. During the 8-hour period from 8:00 to 12:00 and from 1:00 to 5:00, were you required to stay in the substation proper? A. Not necessarily.

Q. What do you mean by that? I am not asking you whether you did, but whether you were required to. The answer ought to be yes or no, shouldn't it? A. It all depends on what you mean by the substation proper.

Q. The substation building. A. No. Such an arrangement would not provide time to do any of the neces-

sary yard work outside the building, or the work over on the cottage.

Q. Were you permitted to spend any of that time in your house? A. At times we were requested to.

Q. To spend some time in your house? A. Uh huh.

Q. Well— A. Because in the nature of the work, it was commonly required that painting be done within the house, because that was also Company property. You might spend three or four weeks in the house, just painting it.

Q. Were you permitted to stay there at times when you were not ordered to stay there? A. There was, I should say, complete freedom of motion between the station and the cottage grounds, because they were one and the same.

[Pp. 38/39, lines 6/2]:

Q. By Mr. Sokol: Did you receive an order from the Company, an instruction to the effect that 40 hours of work shall constitute a work week while you were in the substation? A. Yes.

Q. Now, did you receive time and a half for such time after 40 hours while you were working in a substation? A. Yes.

Q. You have already explained that it depended upon the clerk, the division clerk. A. All such time had to be O.K.'d by the division clerk.

Q. I see. However, the specific time that you got paid time and a half for was when you were actually answering emergency calls over at the station? A. Other than when we went on a six-day operation, yes.

Q. I see. When the Government ordered that the 48-hour week should apply to this Company, that is, generally to the industry and this Company, at that time you got

eight hours of overtime for the sixth day? A. That is right.

Q. At time and a half? A. Yes.

Q. Time and a half your hourly rate? A. Yes.

[P. 40, lines 8-16]:

Q. By Mr. Sokol: What do you mean by "stand-by time"? A. Stand-by was time that was required that you spend on the substation property.

Q. Who told you you had to spend that time? You were instructed to that effect? A. Yes.

Q. Well, were you relieved on occasions from the stand-by time? A. Only on our days off.

[Pp. 47/48, lines 16/6]:

Q. Now, in addition to the log book there was a daily time sheet that you made out, and later a weekly time sheet? A. That is right.

Q. You didn't put your stand-by time on that? A. No.

Q. Why not? A. There was no place to put it.

Q. What do you mean by that? A. There was no blank left on there to put it. In other words, you filled the form out in the manner requested by the Company.

Q. Was your schedule of hours also put up in the station; I mean your 8:00 a.m. to noon, and 1:00 p.m. to 5:00? Was there a schedule posted in the station?

A. That was in the orders.

Q. In the orders? A. Yes.

[P. 50, lines 15-20]:

Q. Did you ever do anything on the substation grounds or at your house that gave you any form of financial return outside of that received from the Company? A. I might possibly have received small financial

gain from selling something I had boughten before, or trading it to some one else there; I mean, for something else I wanted.

[P. 55, lines 14-24]:

Q. Let me put it this way: while you were working on your radio equipment, or studying radio, is that part of the time you compute as overtime for which you should receive pay on an overtime basis? A. I will say that time I spent in operation, or waiting to operate station equipment, I feel is overtime.

Q. And what portion of the time did you spend in waiting to operate? A. Well, if you consider lying on your back with one ear open, asleep, so when the alarm bell or the phone goes off you're up like that to get it, it is all inclusive.

VERNON B. WERT.

[Pp. 3/4, lines 14/24]:

Q. Do you remember who first employed you on behalf of the Edison Company as a substation operator?

A. Yes.

Q. Who was it? A. Mr. Dyer.

Q. Did he give you your instructions with reference to your duties in that position? A. Yes.

Q. Have those instructions been materially altered since that time; or have you continued to work, to a large extent, under those instructions that he gave you? A. I have continued to work under the instructions he gave me. There have been changes from time to time that have been affected by orders that have been put out, not only by himself, but by his successors.

Q. Did he arrange with you for the basis of your compensation when you began to work? A. He established the amount of money that I was to earn, yes.

Q. On what basis were you paid when you first began to work? A. I was given a monthly salary, my house and my electric energy.

Q. What were your instructions with reference to your hours of work? A. I can't remember that; however, the station that I first went to as a substation operator was a one-man substation, and we were not to leave the property. It was our duty to do whatever was required of us, and the statement by Mr. Dyer remains in my memory as having been "The hours of employment are what the job requires."

Q. And you were required to stay there 24 hours a day, except on your days off. Is that correct? A. That is right.

Q. Has that been the continuous practice ever since that time? A. Yes.

[Pp. 5/6, lines 19/6]:

Q. Cardiff is what you might call a two-man station? A. Yes; it is a 24-hour station, but it has been considered that there is just a little bit too much for one man to do there, so they put two men in there.

Q. Does each man have a house of his own there? A. Yes, sir.

Q. On your nights off you are at liberty to leave the substation premises? A. Well, you understand, we divide this responsibility of standing by between the two men.

Q. That's right. A. One certain night would be my night to do as I pleased, and the next night would be his night to do as he pleased.

[Pp. 8/13, lines 26/21]:

A. Each one makes out their own daily time sheets.

Q. What were your instructions with reference to making those out? A. That is a rather involved question, and you would get a rather involved answer. You have to go through a whole lot of stuff; but, in effect, it amounts to the fact that each day you work eight hours. At the conclusion of five days you would have had in 40 hours. We are now working six days a week, so that means that the sixth day in the week would be an over-time day, and it is so recorded.

Q. In these time reports that you each make out, what is your practice with reference to showing the time or the hours worked? Which is it you show, the hours worked or the time during which you worked? A. We don't show the times that we worked.

Q. I mean by the clock, the time shown by the clock? Do you show the time, so to speak, when you go on duty and when you go off duty, or just so many hours worked? A. We put down the date and what we were doing. There are various charge numbers assigned to different types of work, but our work is considered as operating; so following the date at the left-hand side we put down "routine operating," then the station name, the charge number and the hours that we worked.

Q. Eight hours? A. Yes.

Q. You put that down regardless of whether you worked more or less than that time, do you? A. Oh, no. If we work more than eight hours, why, then, we put in for overtime for that. That goes in a different section of the time sheet.

Q. On the same form? A. On the same form.

Q. What if you work less than eight hours; what do you do then? A. We put in eight hours.

Q. You mean you do work eight hours every day? A. We do put in eight hours every day.

Q. Active work every day? A. We do what is necessary to operate the station, yes. We have certain routines that cover a definite period of the day in which we put in eight hours.

Q. Does it take all of the eight hours to follow that routine? A. We take our readings each hour, keep our lawns and shrubs up. We have to keep certain records, and keep track of the load and temperatures, yes.

Q. You have no leisure time at all during the 8-hour period? I mean when you have gotten everything done that you are supposed to do? A. I wouldn't say that we were constantly applying ourselves to physical work at all times during the eight hours. There are times when you might sit down and take a deep breath and think about what the radio program that night might be going to be. No, I've never found that the Company was a slave driver or a stickler for the detail of putting in exactly an 8-hour day.

Q. In other words, if you had accomplished your assigned tasks, you didn't feel obliged to keep busy? You could sit down and wait for the next task? A. It would take the entire daylight period to accomplish our assigned tasks, because our assigned tasks consisted of taking readings—

Q. What? A. Consisted of taking readings on our instruments, keeping track of our temperatures, and generally seeing to it that the station is operating correctly. In my particular locality the temperatures rise pretty rapidly. There is a 50 to 55 degree raise during the day—

time. And we have transformers with peculiar characteristics that heat up pretty rapidly, and it could be that it would be necessary to put more forced draft on to our blowers during the daylight period than it would be necessary to put on at night. In other words, we are familiar with the situation at all times.

Q. Well, these intervals you say that do occur when you can take a breath, how long do they last? A. Outside of a general routine, it wouldn't make much difference. There might be a day when a fellow felt a little bit indisposed, and he wouldn't do much that day; but he would do a lot tomorrow. Maybe he doesn't hoe any weeds today, and hoes twice as much tomorrow. Or you might have switching to do, which sets you back; but the following day you'd catch up. I try to put in a conscientious day's work on the job.

Q. You are actively busy most of the time? A. I am actively busy most of the time, and try to keep my own yard and grounds up, in condition which would reflect credit to the Company. I don't like to see a weed patch; and if you've been around over the system, you will probably notice they are generally pretty well kept up.

Q. By your own yard and grounds, you mean the grounds around the house? A. The grounds around the house and the grounds around the station, yes. It's on the station property.

Q. You said you kept those up and also around your own. You mean around your house? A. Yes; between our house and the street, I just finished cleaning the weeds out in there. There is a hedge over there that takes two or three hours to crop that back and rake up the mess that is left.

Q. Do you have a lawn around your yard. A. Oh, yes.

Q. And the mowing of that is part of your eight hours' work? A. We have always considered it to be that, yes. It wouldn't make a great deal of difference what we were doing, as long as we were in sound of our bells, so that we could answer them. There's no more difference in the daytime than at night, for that matter.

Q. Well, at 4:30 or 5:00, your 8-hour period ends, does it? A. At 4:30 on those certain nights that I have mentioned, one or the other of the men is at liberty to do as he pleases.

Q. Well, the one that isn't at liberty, what does he do then? A. Well, he stays there. He sticks around.

Q. At the station or at his house? A. No, he doesn't stick around the station. He can go over to the house, because there is an alarm bell there that would let him know if there was anything happening at the station, and there is a telephone there, so if anybody wanted him he could hear the phone ringing, and answer it at the house. There are extension bells and phones in both houses, I might say.

[P. 17, lines 14-24]:

Q. You are both on duty, as far as active work is concerned, then, at the same time, except on your nights off and days off? A. We are actually both on duty now from 8:00 o'clock in the morning until 6:00 o'clock at night, or an 8-hour period between 8:00 a. m. and 6:00 p. m. It doesn't make any difference which eight hours you work. You can work from 9:00 to 6:00, or you can work from 8:00 to 6:00, and take a couple of hours off in the middle of the day for dinner, or any way you

wish. There is the 8:00 a.m. to 6.00 p.m. period in which we put in our eight hours.

[Pp. 18/19, lines 24/12]:

Q. Now, each month you get your regular pay check. Did you receive anything else for any overtime worked?

A. Any hours that we were not on duty, that would be the hours that we considered ourselves to be on call or on stand-by. In the event we were actually called out, we were permitted to put in a reasonable amount of overtime.

Q. And you listed that on your time report? A. Yes; that was entered on our time sheets.

Q. Did you make any check to see whether or not it would be approved before you put it in on your time report? A. No, I didn't. I talked with my division superintendent about various amounts of time that would be allowed for doing various sorts of work, and we seemed to be more or less in agreement on all of them. I don't remember of ever having that questioned.

[Pp. 19/20, lines 22/17]:

Q. Can you tell us what your plan was in asking for overtime credit? A. Well, roughly speaking, when we answered a station alarm that had us get out of bed to normalize our station, no objection was ever made to our putting in hour's overtime; but when we were required to answer telephone calls from a consumer that required certain other telephone calls as a consequence of the original consumer call, if you see what I mean—it might be one, it might be two, or it might be a half a dozen—we figured our overtime on the basis of 15 minutes for each one of the incoming calls. That doesn't mean that we're going to get 15 calls in a 5-minute period that we would

put in for 15 minutes for each one of those calls. We figured that if at exactly two minutes after 1:00 in the morning, or five minutes after 1:00, let us say, in the morning, a man got a telephone call and there was some trouble that needed attention, why, then, we figured that we've got 15 minutes to conclude this transaction before we are actually entitled to go back to bed. Now, as a matter of fact, maybe it only took us five minutes, or it may have taken the full 15; but there was never any question about that.

[P. 30, lines 12-16]:

Q. Most of the evenings when you were not off, you spent in your home and not in the substation? A. Now?

Q. Yes. A. I spend it in the house.

[Pp. 31/32, lines 22/10]:

Q. Did this paper work thus occasioned cause you to work actively more than eight hours on the days when you had this extra paper work? A. No; I never spent more than eight hours a day to do the work I was supposed to do. I never put in any overtime for doing paper work. If I couldn't do it that night, I waited until the next day. Then if there was a working party there the next day, finally, after a certain period of time, you would end up with quite a little clerical work to do.

Q. When was the last time you raised chickens or rabbits? A. About 1922. Pardon me; if you mean on the job—

Q. Yes. A. Yes; about 1923, I think it was.

[P. 35, line 2]:

By Mr. Sokol:

[Pp. 37/39, lines 3/17]:

Q. Now, we have been referring specifically to the years 1942, '43 and '44, up to the present time. Will you state whether or not during the first part of 1942, or, specifically, on January 1, 1942, an order was issued signed by Mr. Cavner and Mr. Tice relating to the hours of duty? Do you know that there was such an order?

A. Yes. That was known as Substation Department Order No. A-36.

Q. Who is Mr. Tice? A. He, at that time, I think, was Manager of Operations.

Q. Who is Mr. Cavner? A. He was the superintendent of substations.

Q. Will you state whether or not that order provided that you would have to be on call 24 hours a day? A. It did so stipulate.

Q. Will you state further whether or not that order provided that your compensation, however, was not to be based on 24 hours a day, but on 40 hours a week? A. That is right.

Q. Is it a fact that you have received certain overtime after 40 hours in the work week? A. We have.

Q. Up to the time that the Manpower Commission changed the work week to 48 hours. Is that correct? A. That is right.

Q. Despite that change, your regular work week has been 40 hours a week? A. It's 40 hours a week.

Q. It is 40 hours a week? A. Yes.

Q. The only difference is that you get an extra eight hours of overtime? A. That is right.

Q. Now, you stated that you did get some overtime, for instance, in answering those telephone calls that you mentioned? A. That is right.

Q. How was that overtime based? On what method of computation? A. It was one and one-half times the average annual rate.

Q. Wasn't it the average hourly rate? A. The average annual hourly rate. I beg your pardon.

Q. In receiving your pay, then, you considered that you were receiving pay for eight hours a day? A. That is right.

Q. Nevertheless, after you worked your eight hours a day, you did remain on duty. Is that correct. A. I remained on call, on the job.

Q. On the job? A. Yes.

Q. I call it "on duty". Is there any difference? A. Well, we weren't supposed to say that we were on duty after we put in our eight hours.

Q. I see. As I understand it, you were on duty for eight hours? A. That is right.

Q. Then you went on call for the period thereafter? A. That is right.

Q. Were you required by any Company instructions to remain on call continuously for the balance of the 24 hours?

I mean, could you leave the premises? A. We have this Order A-36 that says certain employees are required to remain on the job 24 hours a day, or words to that effect.

Q. Did you do that? A. Yes.

[Pp. 41/42, lines 19/3]:

Q. In computing the overtime that you were paid—you were paid some overtime; is that correct? A. Yes.

Q. In computing that, was that based upon an 8-hour day, five days a week when you were working five days a week? A. Based on a 40-hour week, yes.

Q. It was based on a 40-hour week? A. Yes.

Q. In other words, it was time and one-half after the 40 hours? A. That is right.

[Pp. 42/43, lines 17/11]:

Q. Did you ever receive any pay for the stand-by time? A. Not as such.

Q. It was only when during the stand-by time you had an emergency call?

(Statement of counsel omitted.)

Q. By Mr. Sokol: What do you mean by stand-by time, Mr. Wert? A. Time when you are off duty, but on call.

Q. Now, during some of that time, while you were on call, you did receive calls to the station for emergency work. Is that right? A. That is right.

Q. And you did receive some overtime for some of that time? A. That is right.

Q. Was there another order issued in January, 1943? That is, was Order No. A-36 revised in 1943? A. Yes; there was a revision issued, dated January 1, 1943.

[Pp. 48/49, lines 17/13]:

Q. Well, now, when was there any change in that setup, if any? A. Well, we started, as far as I know, strictly on a 40-hour week some time in 1941, I believe it was. I am not absolutely certain about that, but the reason that I recall that was because prior to that time we had relief schedules that gave us eight or nine or ten days off a month, depending upon how many Saturdays and Sundays there were in that month. We were working five days a week, and that's the way we arranged it. But along about the early part of 1941, I think it was, they told us we couldn't do that any more; that according to

the Wage and Hour Law it was going to be necessary for us to take two days off each week. In other words, we could only work 40 hours in a week, and then we would take two days off. Well, it figured out that a man could get a Saturday and a Sunday, and that would be his days off for that week. Then he could take Monday and Tuesday, and that would be days off for that week, and that would give us as many as four days. Well, when you divided that sort of a scheme up through a rotation of the relief schedule among three men, the result was that about every four weeks, or every three weeks you got four days off, I think it was. I think that's the way it worked out.

[P. 51, lines 4-14]:

Q. But, at any rate, within the last year or two you have been receiving some overtime payments for unusual or out-of-the-ordinary tasks? A. Yes.

Q. Being called for telephone calls, and so forth? A. When you're on call and called out in a case of trouble, you were permitted to put in for overtime for the handling of that case of trouble.

Q. But at any time have you ever been paid anything outside of your regular monthly salary for being on call? A. No; I never received anything for being on call.

[P. 52, lines 6-12]:

The Witness: Our time slips—and I have copies of the time slips for my own information that I have kept since I went to this Cardiff station, and on each week's time slip we show that we work 40 hours, and we also show the amount of overtime that we've worked. In the case of the sixth day, that's an overtime day. That is totaled in a column at the right-hand side of the sheet.

[Pp. 54/55, lines 15/4]:

Q. All right. Now, were you advised that it was due to the Wage and Hour Act that they went on the 40-hour week? A. I don't remember.

Q. Well, anyway, you do know you went on a 40-hour week? A. That is right.

Q. And that your monthly rate was broken down to give you an hourly rate based on 40 hours week. Is that correct? A. Our monthly wage was broken down to show the hourly rate that we earned in that month, yes.

Q. Based upon 40 hours in the week? A. That is right.

Q. It was not based upon 24 hours in a day, was it? A. It never has been.

Q. It was based upon eight hours a day, five days a week, or 40 hours a week. Is that correct? A. That's correct.

(3) HYDRO STATION ATTENDANTS.

M. E. ROACH.

[Pp. 4/5, lines 22/14]:

Q. Now, will you tell me the duties of a hydro station attendant? Please remember, Mr. Roach, it isn't a question of trying to confuse you. I don't know anything about your work and electricity, except that when you press a button you generally get it—and in my car sometimes you don't. A. Well, it consists of checking the equipment, such as transformer temperatures, bearing temperatures, oil levels on transformers, oil levels on bearings, governor oil pressures, and different incidental things around the station. Your switchboard is covered with a bunch of meters. You glance over those and tell whether they are normal or not. If they are not normal,

why, you correct the trouble, if it is possible, in your station. After that is all done you do your janitor work, such as mopping up oil, any janitor work that you may have, dusting, cleaning windows; and there is always a certain amount of paper work to be done around a station like that. What I mean by "paper work" is your log book that you have to keep up, your operating reports and switching reports.

[Pp. 7/9, lines 20/12]:

Q. How long would it take you to do the physical work that you have described, the reading of these meters and checking? How much of your time would that take?

A. Well, we will say two hours in the morning and an hour in the afternoon.

Q. What other duties, if any, did you have to perform? A. I worked in the maintenance shop. When I would get back from my inspection in the morning, I went to work in the shop.

Q. What is the maintenance shop? A. Well, that was where the equipment, the lathe, and all of that kind of machine tools were housed.

Q. Did you have any regular duties there? A. Well, I was told to help the machinist; so you might say I was under his jurisdiction when I got in there.

Q. What I mean is, was there any regular thing you had to do, or did you just do what you were requested or directed to do? A. Well, whatever maintenance work or repair work was going on, I helped do it.

Q. What were your hours supposed to be? A. 7:30 to 4:30 with an hour for lunch.

Q. What do you base your claim for overtime on? A. I don't understand the question.

Q. Well, you are suing for a claim of overtime which you haven't been paid for. On what do you base that claim? A. I call it standby time.

Q. Well, tell me on what you base that. A. I was there on the property. I had to live on the property. I couldn't go and come as I pleased.

Q. Did you have any work keeping up the yard? A. Very little. There was a utility man there that done most of it.

Q. So, as I understand it, your regular hours of work were 7:30 in the morning to 4:30 in the afternoon, with an hour off at lunch? A. That is right.

Q. You have given us your estimate, which I won't repeat; and instructions were when you finished up you were to go into this machine shop and assist the man there? A. That is right.

Q. Now, why didn't you leave the property at the end of your day at 4:30? A. I was told when I went there it was a 24-hour job, and I was to stay there.

[P. 10, lines 1-22]:

Q. Well, anything that you think will give us any light on the subject. A. Well, I went to work in '27. I worked on Kern River to '32. In January of '32 I was asked if I would take this job at Kaweah, and I was told that it was a 24-hour-a-day job.

Q. Who asked you? A. This Mr. Robertson.

Q. Go ahead. A. And he told me it was 24 hours. At that time we worked physical labor to noon, and was there the rest of the time, but that was changed later.

Q. Well, what was changed later? A. It was later that we worked eight hours during the day, and stood by the rest of the time.

Q. What were you supposed to stand by for? A. For station disturbances, to catch anything that was wrong with the station. There is an alarm bell in the cottage.

Q. Go ahead. A. Along with the alarm bell there are three telephone lines.

[P. 12, lines 4-15]:

Q. When did they first start paying you any overtime? A. June of '41, I believe. It is kind of hard to recall dates that far back. It is for me, anyway.

Q. I won't charge you with fraud, if you don't get the dates right. I don't remember, myself. The best you can remember, approximately, is about June of '41? A. I believe that is when they started paying overtime.

Q. What did they pay overtime for? A. For the time that you were called out.

Q. After normal hours? A. After 4:30 in the evening, or before 7:30 in the morning.

[Pp. 13/14, lines 20/26]:

Q. Now, since then you have been paid overtime for any active duty that you performed after 4:30: that is, while you were in this position? A. As far as I know, I was.

Q. Who kept your time sheets? A. I kept my own. That is, I put the hours on it and signed it, and it went into our Canyon office.

Q. That is what I am asking you. Did they furnish you daily or weekly time cards? A. One time we worked on a daily, then went to a weekly, and then went back to a daily.

Q. Those cards had some space on them to show overtime? A. The card does now. I can't recall just how the other cards were made up, but I am sure they did.

Q. You put down all the overtime where you worked actively over an hour? A. Yes.

Q. I understood you to say if you worked less than an hour you ordinarily didn't put in a claim for it? A. Not ordinarily; unless, maybe, tonight it was 45 minutes and tomorrow night it was 45 minutes. You could recall that much, but as far as keeping track of your time back, it wasn't done, or, at least, I didn't do it.

Q. You haven't any record of it? A. No.

Q. Well, then, I understand that if you had any during the week, or if you had any protracted spell, even if it was less than an hour, you could remember that and put it down; but if it was 10 or 15 minutes you didn't try to keep track of it. Is that correct? A. No.

Q. I say, "Is that correct?" A. That is.

[Pp. 15/16, lines 13/7]:

Q. Did your family live with you? A. Yes.

Q. What does your family consist of? A. My wife and one child.

Q. Boy or girl? A. Boy.

Q. How old? A. He is eight years old, now.

Q. About how much time would you think you spent with them: just an average, approximately? A. You mean the hours a day?

Q. Per day, yes; or per week; whatever way you want to establish it. A. Well, that is hard to answer. Some nights I wouldn't be called out, and I'd be there all evening until bed time. Other nights I wouldn't be there, maybe, 30 minutes; just long enough to eat.

Q. After 4:30 you were at liberty to do anything you pleased with your family, so long as you didn't go beyond the hearing distance of the alarm. Is that correct? A. That is right.

[P. 20, lines 20-26]:

Q. By Mr. Sokol: At the close of the normal work day did you make a report to the switching center? A. Well, about 4:15 in the evening.

Q. What was that report? A. Well, it was a reading; the weather, kilowatt hours generated, the amount of water in the river, water used in the station.

[P. 22, lines 5-19]:

Q. Prior to 1941, when you started getting paid for overtime, were you called out more or less? A. More.

Q. Since 1941, your call-outs during which you got paid overtime have been less? A. Yes.

Q. I think the Court might be interested in knowing just what work you put in there in the so-called standby time, the actual work. Now, during a storm you might be called out for as long as an hour or more? A. Yes; or you might be called out and be out half the night.

Q. You got paid from the time you left the premises to the time you returned? A. Yes; if it was over an hour or fraction.

[Pp. 23/25, lines 24/8]:

By Mr. Sterry:

Q. Just a few questions, Mr. Roach. In normal times, laying aside storms and unusual conditions, normally how much time would you think out of the 24 hours you spent eating and sleeping? A. Well, that is hard to say. Sometimes you sleep more than others.

Q. Well, I know that; but I am asking you for an average; just the normal average. A. Well, say we slept seven hours, and say two hours for meals.

Q. I understood you to say that sometimes you had been interrupted, but on an average how much of the time did you spend in the company of your wife and child,

aside from eating and sleeping, playing with your child and conversing with your wife? How much would you think that would average? A. That is hard to say. I don't think I could make an average of that.

Q. Well, your boy was very young at that time. I suppose you played with him as much as you could, didn't you? A. Oh, when he was awake, I suppose I did.

Q. Well, how old did you say he was now? A. Eight years old.

Q. How old was he at the time you left this job? A. Well, that was two years back.

Q. He would be six? A. Well, possibly five.

Q. Between five and six? A. Yes.

Q. That is a very interesting age in my judgment. Didn't you play with him then? A. Oh, I can't recall that I did. I suppose I did. Any father plays with his child, but I never gave it any thought then, and I can't figure it out. I don't see how you could figure it out now, correctly.

Q. You couldn't give any estimate of what time? A. No.

[Pp. 26/27, lines 6/9]:

Q. Do you remember what you showed on your time card at that time when they weren't paying overtime? A. At that time we were told to put eight hours only on our ticket.

Q. And you put eight hours on it? A. We did.

Q. And part of the time, until this change was made, you didn't work beyond noon? A. Well, we were there.

Q. I know; but I mean you didn't perform any actual active service? A. Only on my own personal lawn around my house. I kept that mowed and watered, and such things as that, which wasn't necessarily considered Company work.

Q. I know; but your actual active work—let's leave aside standby time—was until noon, and then later it was changed? A. Yes.

Q. In that time, no matter what it was, you just put eight hours in there? A. Yes.

Q. And then after the overtime came in, you put the overtime in as and when you were called out? A. Naturally.

Q. Who told you to show just eight hours on your time card? A. I can't remember, now.

Q. But it was either at the time you went there or shortly after they told you to show eight hours? A. Yes.

CLARENCE ROGERS.

[Pp. 2/3, lines 21/12]:

Q. Tell me your age and where you live? A. I live at Three Rivers, California, Power House No. 1. My age is 40, I guess.

Q. Are you married? A. That is right.

Q. And have a family? A. One son.

Q. How old? A. Eight.

Q. Your wife is living with you? A. That is right.

Q. Where do you live; in your own house, or on Company property? A. On Company property.

Q. You said Power House No. what? A. No. 1.

Q. You don't live in the power house? A. Oh, no; it is nearby.

[Pp. 5/6, lines 16/26]:

Q. Now, just realizing that I know nothing about the generation of electricity, tell me just what you do there.

A. What I do?

Q. Yes. A. Well, we have the two plants there to take care of. I have to make regular inspections at 7:30 in the morning, 3:30 and 4:00. I have to keep the place clean, and see that all mechanism is functioning properly.

Q. What do those inspections consist of? You must remember they mean everything to you, and don't mean anything to me. A. You have your bearings there, all of your relays, your governor that you have to keep oiled. You have to check your oil in your bearings.

Q. The station is, I think you said, an automatic one. Is that right? A. Fully automatic.

Q. It runs itself from the power generated there? A. That is right.

Q. How long does your morning inspection take you?

A. It will take me about four hours to make the rounds through both places, sometimes longer, cleaning them up, and the like.

Q. When you speak of cleaning up, do you mean to include work on machinery, or just sweeping up? A. Well, it is dusty around that place, and the rotation of those generators pull all the dust in, and you have to wipe up all over the floor and all over your machinery.

Q. All right. Let's break it down for just a minute. How long will it take you to make the inspection of your machines and your gauges, and do any oiling of machinery without dusting, if you can give me an estimate of that. A. I would say I could do it in an hour.

Q. Both places? A. Both places.

Q. And the other three hours you would take to do what? A. Cleaning the place up.

[Pp. 7/9, lines 24/13]:

Q. Then, altogether, you figure that it takes you about four hours to make your original inspection and clean up the two plants? A. Yes.

Q. What time do you start in the morning? A. 7:30.

Q. And that takes you, then, until about 11:30? A. That is right.

Q. Does that include your automobile trip between the two plants? A. It includes the trip between the two plants, yes.

Q. At 11:30 what do you do? A. I usually work in the shop with the electrician.

Q. Until when? A. Well, from then, if I have my grounds all cleaned up, until around past 3:00.

Q. Don't you take any time for lunch? A. Oh, yes; an hour out for lunch, to be sure.

Q. You start at 7:30? A. From 7:30 to 12:00.

Q. You get back at 11:30, and you take your lunch, then, between 12:00 and 1:00? A. Between 12:00 and 1:00.

Q. Then when do you have to make your next inspection? A. The next inspection comes at 3:30.

Q. How long does that take you? A. Well, I've got to get back and make my inspection at No. 1 at 4:00, work up the data and report it to the switching center.

Q. How long does that take you? A. That will take an hour.

Q. So that you will generally be through, then, at 4:30? A. 4:30.

Q. Then what do you do? A. What do I do after that?

Q. Yes. A. Well, for the last four years I have been, what you might say, studying.

Q. What? A. The operations of the plants along with an electrical course.

[Pp. 13/14, lines 23/17]:

Q. By Mr. Sterry: Now, at your place, your duties, so far as inspections are concerned, were over at 4:30, weren't they? A. So far as my eight hours was concerned, they were up at 4:30.

Q. All right. Now, where did you go, then, generally, following this course of study? A. They have an office, what I call an office, that the Company has their alarm system in, adjacent to what you might say is my bedroom. I usually go in there to do my studying, where there isn't any noise from the radio, and it is more or less quiet, other than telephone bells.

Q. When did you have your dinner? A. Oh, around 5:00.

Q. What did you do after dinner? A. I studied.

Q. How late? A. Usually around 10:30 and 11:00 o'clock.

Q. Did you sleep any at all? A. Oh, yes; I sleep some. Gosh, you have to have some sleep. I usually get along with six or seven hours sleep, myself.

[P. 15, lines 3-7]:

Q. You would say you spent between eight and nine hours sleeping and eating? A. Did I say eight and nine?

Mr. Sokol: Sleeping and eating, he said.

The Witness: I would say something like that, probably.

[P. 15, lines 14-25]:

Q. You didn't spend any time at all with either your son or your wife? A. Not too much.

Q. Well, that is a rather ambiguous question in these days of domestic relations. What is too much? How much time would you think, altogether, you spent in the company of either of them on an average? A. Well, that would be a hard question to answer, I would think; because I couldn't say right off just what would be the average.

Q. Are you fond of your son? A. Absolutely. I think a father should be.

[Pp. 16/17, lines 8/1]:

Q. What about staying on Company property: have you had any instructions about that? A. Plenty.

Q. What were they? A. You stick there 24 hours a day, unless it's your days off.

Q. You had two days a week off always until the Southern California area was put on a 48-hour week? A. That is right.

Q. I haven't found anybody that remembers that date. Do you happen to know when that was? A. I believe it was November, '43, wasn't it, that we went on 48 hours?

Q. I can't tell you. It is a matter of public record, but we haven't been able to fix it. A. Sure; November 1, 1943, we went on six days a week.

Q. And you have just gone back on a five-day week? A. We went back to a five-day week.

Q. Very recently, wasn't it? A. The 1st of September, I guess it was.

[Pp. 22/24, lines 20/6] :

Q. In keeping your time cards—you kept your own time cards, didn't you? A. That is right.

Q. Did you keep daily time cards or weekly time cards? A. I keep a weekly time card.

Q. Did you transpose that over to a monthly card? A. It is transposed over to a monthly card, yes.

Q. I know it is; but did you do it, or did some one else do it? A. Some one else does that.

Q. You just turn in a weekly card? A. I turn in a weekly time card.

Q. Now, you showed on that all the overtime that you performed? By that I mean any active duties beyond 7:30 and 4:30? A. Well, I wouldn't say all of it, because a lot of times, maybe, I'll go out for five or ten minutes, and I don't bother with it. So I don't know.

Q. Nobody told you not to bother with it, did they? A. No, they didn't.

Q. I mean that is of your own volition? A. That is my own loss.

Q. What I am getting at is: did you turn in all that you thought was worth while? A. I didn't want to rob the Company, so a lot of times I didn't bother with it. It would be some minor thing.

Q. Have you turned in any overtime that has been disallowed or questioned? A. That was questioned?

Q. Yes. A. No; I never have.

Q. They paid all that you turned in? A. All that I ever put in.

Q. Ever since you've been on that job they've paid you time and a half for it? A. Yes.

Q. And you were paid time and one-half for the sixth day while you were on the 48-hour shift? A. That is right.

[Pp. 25/26, lines 8/14] :

Q. When you came to take it, what, if anything, was said about it that you remember; the substance of what he said about the job? A. Well, he told me that I would work a regular eight-hour day, but I would be stuck there 24 hours a day.

Q. What did he say, if anything, about overtime? A. We would get overtime if I was called out after 4:30.

Q. What did he say about a salary, if anything? A. A salary?

Q. Yes. A. I just forget what my salary was when I started on that. I think it was \$140.00, but I have had several raises since.

Q. Anyway, whatever the amount was, am I correct in saying—I don't want to put words in your mouth, because it is incorrect to do so—that he told you it paid a salary of \$140.00—and it might have been more, but he named some figure—and then you worked eight hours a day, but that you were stuck there for 24 hours a day? A. That is right.

Q. Just when you were relieved? A. That is right.

Q. That you would have to answer any alarms? A. Yes.

Q. And if you were called out after the eight hours, you would get overtime for the actual work? A. That is right.

Q. That is what you understood your compensation would be? A. That's it.

Q. That is correct? A. That is correct.

[Pp. 26/28, lines 18/3]:

By Mr. Sokol:

Q. What eight hours did Mr. Schaefer tell you that you would have to work daily? A. 7:30 to 12:00, and 1:00 to 4:30.

Q. I am not entirely clear with respect to your answer. Did he state that you would get paid while you were waiting to answer an alarm or a call? A. You mean after my eight hours?

Q. After 4:30. A. No, I didn't get paid.

Q. What did he tell you? A. I would only get paid for the eight hours a day. It was 40 hours a week at that time.

Q. Then when you got a call after that, if you went out on it— A. After that I got overtime for it.

Q. You are sure he told you that the hours were 7:30 to 12:00, and from 1:00 to 4:30? A. That is right.

Q. When you go out on a call, do you report to the switching center? A. If it is anything that will interrupt the capacity or the output of the machine, we do, yes.

Q. What I am getting at is: can they tell what overtime you put in? A. Can they tell?

Q. Yes. A. They have no way of telling.

Q. What was that? A. They have no way of telling what overtime I put in, no. I put it on my time card.

Q. I see; but they know what trouble calls have been answered, do they? A. They know what happens, yes.

Q. And what work you do? A. Yes.

Q. And from that they can assume what time it is? A. How long it will take, yes.

[Pp. 33/34, lines 6/3]:

Q. By Mr. Sokol: You make up your weekly time card. Is that correct? A. That is right.

Q. How many hours do you put down daily as time worked? A. Eight hours.

Q. Why do you only put eight hours down? A. Because on top of your time card there we have a space where you enter the time you start and the time you quit.

Q. You only put down, then, from 7:30 a. m. to 4:30 p. m.? A. With one hour out for lunch.

Q. Why don't you put in the time after 4:30 p. m. that you are waiting for these calls? A. Well, that would be overtime, wouldn't it?

Q. There is just a space there for your regular time? A. Well, no; we have a special space there for our overtime, too.

Q. And the reason you don't put that other time down is— A. You wouldn't get any pay for it, if you put in for waiting, overtime for waiting. You've got to show something there that you did.

Q. In accordance with Mr. Schaefer's instructions? A. According to the instructions.

[Pp. 34/35, lines 24/19]:

By Mr. Sterry:

Q. Mr. Rogers, with reference to whether you were paid for these calls or not, as I understand it, when Mr. Schaefer offered you this position—correct me if I am wrong—he told you that there were eight hours' work? A. Eight hours' work, is right.

Q. And that you would be stuck there for 24 hours, except on your days of relief? A. You're supposed to put in eight hours' work, but that you stay there 24.

Q. You would have to stay there where you could answer your alarms and telephones? A. To answer your alarms and telephones.

Q. And for any actual time that you were called out, you would be paid time and a half for it? A. That is right.

Q. That was the arrangement, as you understood it? A. Yes.

Q. And that was the salary or compensation the Company was agreeing to pay you for that character of work. That is correct, isn't it? A. That is the way I understood it.

[Pp. 36/37, lines 18/16]:

Q. What made you think that they wouldn't pay you for any time after your eight hours, except when you were actually answering calls or fixing up trouble? A. Well, they never have paid it. That's the only thing I have to go on.

Q. In other words, you understood it was a job; that you were going up there and work eight hours, and stay there 24, except on your days off, for which they gave you a salary and overtime for any actual work you did. That is what you understood, isn't it? A. That is right.

Q. And that is the way they paid you? A. They paid me for the 40 hours a week; eight hours a day, or 40 hours a week.

Q. And they paid you, as I understand it, for all overtime that you actually put in? A. All overtime that I actually put in.

Q. They paid you for it? A. That is right.

Q. You say that there was some overtime that you thought was so small that you didn't turn it in? A. That is right.

Q. You don't make any claim for that? A. No.
Mr. Sterry: That is all.

(4) HEAD GATE TENDERS.

E. G. EGGERS.

[P. 4, lines 12-15]:

Q. Now, just tell me your duties generally, Mr. Eggers. A. Well, we saddle a horse at 7:30 in the morning, and ride the flume, patrol, clean the screens, and report in the readings.

[P. 4, lines 23-26]:

Q. By Mr. Sterry: Go on. A. We look for leads along the flume on the way down and on the way back, also, and maintain brush clearance on the trail. It takes about three and a half hours to do that.

[Pp. 7/8, lines 24/19]:

Q. Mr. Eggers, you say that you get up at 7:30 in the morning. No; you didn't say you got up; you said you saddled your horse at 7:30, and rode the flumes. Do you have other duties to perform? A. Sure.

Q. What are they? I wish you would tell me just in your own way everything you do. A. Well, it varies. There are times when it takes longer to get over the flume than other times, according to the weather and according to what the headworks is.

Q. I can understand that, but you told us you ride the flume. Now, is just patrolling the flume all you have to do? A. We've got to look for these leaks all the way along.

Q. That is part of your patrolling? A. That is part of the patrolling. We have to clean the right of way, which is part of the patrolling; and it sometimes takes quite a lot of time.

Q. What else besides cleaning the right of way? A. Then there is the maintenance of the ground there in the park. It is inspected quite regularly by the Rangers, and so forth.

[P. 9, lines 7-25]:

Q. I am talking about this job. Are you supposed to do anything? If you see a leak are you supposed to try to fix it, or just simply report it? A. It depends on how bad it is. If I can fix it, why, I do; but it is very seldom in a cement ditch that you can do anything about it without shutting the water off, and that is my part of the job.

Q. What is your part of the job? A. To shut the water off and be there to turn it back on when they are ready.

Q. You haven't told us anything about that. I have been trying to find out what you are required to do. It is part of your job to turn the water off when you know there is a leak. Now, do you turn it off any other time? A. At any time they call me up.

Q. What was that? A. At any time they call me on the telephone.

Q. Who do you mean by "they"? A. Well, the power house operators and the chief.

[Pp. 10/11, lines 7/25]:

Q. You have had that job now a little over a year and four months. How many times have you shut the water off? A. We don't keep track of that. It is in the log of the power house, but I couldn't tell you that.

Q. Can't you give me an idea whether you did it once, ten times or a hundred? A. I don't know how to answer that question.

Q. Well, I am asking you for your best estimate, knowing it may be an estimate, and knowing it may not be accurate without checking the log. I am asking you to give me your best idea how many times you shut that off. A. Probably seven times. I don't know.

Mr. Sterry: What was the answer?

(Record read.)

Q. By Mr. Sterry: Can you describe the operation of shutting that off? A. Well, you unlock the gate and twist it down. That shuts the water off.

Q. How did you twist it down? A. By turning the wheel.

Q. Is there any physical effort required, or is it easy to turn? A. It has to be turned pretty heavy.

Q. And when you open it up you turn it back the other way? A. Yes, sir.

Q. How long would you say it took you to turn it off or shut the gate from the time you got there? A. I think about 12 minutes is the soonest I have ever got it done.

Q. About how long is the longest? A. I didn't hear your question.

Q. About how long is the longest time? A. Oh, 20 minutes, I guess.

Q. And about the same length of time to open it? A. Yes, sir.

Q. You spoke about unlocking it. When you turn it down, do you lock it? A. Yes, sir.

Q. Then you unlock it when you open it? A. Yes, sir. It has a chain between the two wheels. There are two gates.

Q. Are they substantially the same at both dams? A. They are substantially the same at both dams and that wye where the two flumes come together.

[P. 13, lines 3-26]:

Q. And do I understand that down at the wye, where the two come together there is another head gate? A. Yes, sir.

Q. Now, the majority of times you simply closed or opened the gate at the wye? A. Yes, sir.

Q. How many times have you just closed one of the head gates at one or the other of the dams, if at all? A. Well, one of them has only been closed once, and the other one, I think, twice since I have been there.

Q. And the other times you have been opening and closing the gate at the wye? A. Yes, sir.

Q. When you gave your estimate as to your quickest time being 12 minutes and the longest time about 20, you were speaking about the gate at the wye? A. That is right.

Q. Is there any difference in time at the other gates? A. Well, they are about the same.

Q. How long does it take you to get from the house where you live to the gate at the wye? A. Well, it is not quite an hour; about a half hour to get there. To go over there and close the gate and get back, we call it an hour's job.

[P. 14, lines 9-17]:

Q. Ordinarily, when you start out at 7:30 in the morning, when do you get through on one of these patrol trips you have been telling us about? A. It depends on how much trouble I run into.

Q. I appreciate that, but can't you give us an idea of the normal time? A. In a normal time, I am home by noon. In the afternoon we maintain the grounds, and some afternoons we go out and work on the right of way.

[P. 15, lines 6-17]:

Q. How long do you continue working on the grounds or on the right of way? A. Well, a lot of times when you are irrigating there, because of the condition of the grounds, the way it has been happening, sometimes the water isn't shut off until 9:00 o'clock at night. It is a sprinkler system, and has to be watched.

Q. Well, aside from the sprinkler system, what time are you usually supposed to quit? A. 4:30 is when I am supposed to quit. There is no specific time. It is up to me, you know, to maintain the grounds.

[P. 16, lines 15-23]:

Q. Do you ever go to see anybody? A. Not very often. We get permission to leave up there once in a while.

Q. Well, now, you say you get permission. Why do you have to get permission? A. That is the condition of the job. That's the way it was told to me.

Q. Who told you that? A. L. B. Schaefer, the Canyon Chief, at that time.

[Pp. 17/18, lines 2/4]:

Q. Is he the man that employed you for that job? A. Yes, sir.

Q. What did he tell you about it? Tell me, as nearly as you can. I know you couldn't probably give his exact words; but give me the substance of what he told you about it. A. Well, it was to patrol this flume, maintain the right of way so that we could get back and forth on it, and inspect the flume. Of course, being on the repair gang as long as I had, I knew pretty well what was expected of me.

Q. What did he say, if anything, about your not leaving the house? A. Well, he said it was a 24-hour a day job.

Q. What did he say you were going to be paid for the 24-hour a day job? A. \$160.00.

Q. I beg your pardon? A. \$160.00 a month.

Q. Have you been paid that? A. Sir?

Mr. Sterry: Read the question.

(Record read.)

The Witness: Yes, sir.

Q. By Mr. Sterry: Now, did he ever say anything to you about paying you any overtime? A. Yes, sir.

Q. What did he say about that? A. It would be time and one-half.

Q. For what? A. When I was called out at night.

[P. 18, lines 16-20]:

Q. Did you ask for the job, or did they ask you to take it? A. Well, it was partly both. I was asked by one of the other men whether I would like it, and then he approached me.

[P. 20, lines 1-6]:

Q. And as nearly as you can remember, Mr. Schaefer told you it was a 24-hour a day job, and that you were to patrol the flume, keep the right of way clean, and the property up; that you would be paid \$160.00 for that, and you would be paid time and one-half for any work that you did at night? A. That is right.

[P. 20, lines 12-19]:

Q. Do you have a family? A. Yes, sir.

Q. What does it consist of? A. A mother and my wife.

Q. No children? A. No.

Q. They have lived with you? A. Yes.

[P. 21, lines 15-20]:

Q. In making out your time cards, Mr. Eggers, you have had these time cards given to you, haven't you? A. Yes, sir.

Q. Did you make out your own time cards? A. I sign it—I don't remember now—a certain period of time in advance.

[P. 22, lines 9-18]:

Q. Oh, did you keep your own time? A. Yes, sir.

Q. What is the title of your job; headworks tender?
A. That is right.

Q. You make out your own time sheets, don't you?
A. I sign them. That is all.

Q. Who puts in the time showing what you did?
A. Well, the Station Chief.

Q. What does he know as to what you've done? A. Oh, he keeps pretty close track of it.

[Pp. 24/25, lines 16/3]:

Q. I say, you told me a little while ago that you would never put in any claim for overtime for services performed after 4:30 in the afternoon; but have you ever been called out except at night? A. Well, I went out before dark and tended to it, so it would go through the night. Then I have been out several times during the night.

Q. Did you put a claim in for that? A. Yes, sir.

Q. Has it been allowed? A. Yes, sir.

Q. Have you ever put in any claim for overtime that hasn't been allowed? A. No, sir.

[P. 26, lines 7-12]:

Q. Do you patrol the flumes every day? A. It has been a six-day a week. We are on a five-day week now.

Q. What did you say? A. It has been a six-day a week, but now it is a five-day a week starting the first of the month.

[P. 27, lines 5-9]:

Q. Well, now, you said the sixth day was to be time and a half. A. That is the overtime day.

Q. Was that included in your \$160.00? A. No, sir.

[P. 30, lines 17-23]:

By Mr. Sokol:

Q. Since you have on the six-day week you have gotten time and a half on the sixth day. Is that correct? A. That is right.

Q. How many hours; eight or 24 hours on the sixth day? A. Eight hours.

[Pp. 31/33, lines 7/26]:

Q. Will you state whether or not to your knowledge your monthly salary is based upon eight hours of work a day, or 24 hours a day?

Mr. Sterry: Same objection.

Mr. Sokol: Will you answer that?

The Witness: It is based on an eight-hour day.

Q. By Mr. Sokol: However, you said you were on duty 24 hours a day. Is that correct? A. That is right.

Q. What is your normal working day? I understand you start at 7:30 in the morning? A. Yes, sir.

Q. Then you work through to 4:30, was it? A. That is according to the eight hours.

Q. You work through to 4:30. That is your normal working day, is it? A. Yes.

Q. Now, after 4:30, did you do any work on the grounds? A. Yes.

Q. Is that a regular part of your work? A. Well, I have been doing it.

Q. Have you gotten paid for that particular work?

Mr. Sterry: Just one moment. That is objected to as a conclusion of the witness, evading the province of the Court, and one of the issues in this trial.

Q. By Mr. Sokol: If you know of your own knowledge. A. No, it's a pleasure to have the place look nice when you live there.

Q. Just answer the question. My question was: have you been paid, and there was an objection. Have you been paid? A. I have not.

Q. For the time after 4:30? A. No.

Mr. Sterry: Objected to on the grounds stated.

Q. By Mr. Sokol: Now, in addition to maintaining the grounds, have you done other work after 4:30 p. m., for which you claim you have not been paid? A. No.

Q. You stated that you got paid when you got called out at night. A. That is right.

Q. Explain that. A. Well, if the alarm rings, I call the power house and tell them that the bell rang, and they O. K. me to take off and find out what went wrong. Sometimes it would be an hour, sometimes two hours.

Q. Have you any instructions with respect to how much time you can claim? A. No.

Q. Is there any instruction saying that you could claim so much if you only work a half hour or an hour? Is there anything to that effect? A. There never has been a question asked of that kind, because I have worked for the Company long enough, and they trust me to that extent. I never have been questioned about turning in too much time or too little.

Q. When you go out on a call of that kind, after the work is done—I presume that is on the flume. Is that correct? A. That is right.

Q. —After the work is done, do you report back to the station? A. When I get home.

Q. As soon as you get home you report back? A. Yes.

Q. So that they have means of checking on the time you were gone. Is that right? A. That is right.

Q. And for that actual time you get paid time and one-half? A. Yes, sir.

[P. 42, lines 4-9]:

By Mr. Sterry:

Q. Now, Mr. Eggers, just a few questions. Counsel asked you a question and you started to answer it so he cut you off. You started to say something to the effect that it was a pleasure to work on your grounds. I would like you to continue that answer, and tell me what you meant by it.

[P. 42, lines 17-25]:

The Witness: Well, I have some 500 different varieties of roses that were there when I went there, and it is a pleasure to see them continue to be like the other old fellow kept them. Should the Company say to discontinue them, they won't be there.

Q. By Mr. Sterry: In other words, you enjoy keeping the grounds looking nicely? A. I've got to be there, and I do enjoy seeing something taken care of since I've got to be there.

F. E. GRIFFES.

[P. 4, lines 13-25]:

Q. You own that house? A. Yes, sir.

Q. You have lived there for about how long? A. 48 years.

Q. You have owned the property most of that time? A. Well, my father did, and myself.

Q. How long have you been working for the Edison Company? A. I have been there 27 years.

Q. What is your capacity now? In what position are you employed? A. You mean what I work at?

Q. Yes; what is your job called? A. Well, I am a headworks tender and flume walker.

[P. 5, lines 5-7]:

Q. You were living in the same house that you are living in now when you entered the employ of the Company? A. Yes, sir.

[Pp. 11/13, lines 25/18]:

Q. When do you start? A. At 7:30 in the morning.

Q. Are you at the head gate at 7:30, or is that when you leave your house? A. I am at the head gate at 7:30, on the job.

Q. Then, when do you get back to your house? A. Well, it takes six hours, you see; so I don't take no dinner until I get back.

Q. You don't take anything to eat with you? A. No. I just go down and make the trip and back without anything to eat. I don't take out an hour at noon.

Q. You get back about 3:30? A. Yes.

Q. Then what do you do after that during the rest of the day, if anything? A. Well, if there is work to be done, why, I go back and work on the flume.

Q. That is to say, if you have spotted some work on the flume, you will go back? A. Yes.

Q. If there isn't any work on the flume, you haven't anything more to do that day, then? A. No.

Q. Normally, in this time of year and summer time, after 3:30, what do you generally do? A. Well, you see, at 3:30—I get back at 3:30, and I don't take out no noon hour, so—

Q. You eat your lunch? A. I will eat my lunch which takes an hour, and that takes it up.

Q. Then from 4:30 on—By the way, have you a family, Mr. Griffes? A. I have a wife.

Q. Any children? A. No, sir.

Q. Then you do whatever you want to after that? A. In a way, yes.

Q. How far is your residence from the head gate? A. 700 feet.

Q. It takes you about how long to walk? A. Oh—

Q. Normally, I am talking about. A. About 20 minutes.

Q. So you usually leave your house, then, in the morning some time between 7:00 and 7:15? A. Between 7:00 and 7:15.

[Pp. 14/15, lines 23/5]:

Q. Now, in winter time or times of storm, you may have to spend a great deal more time both on walking the flume and keeping the debris off of the screen. Is that correct? A. Yes, sir; that is correct.

Q. Now, if you spend more than eight hours a day at that, you put that overtime in, don't you? A. Yes.

Q. And you get time and a half for it? A. Yes, sir.

[P. 17, lines 2-26]:

Q. Let me ask you during this time that they have been paying overtime, have you ever turned in any that has been rejected? A. No.

Q. You don't send it in in writing; you just call your foreman up and tell him? A. I just call my foreman, and he puts it down.

Q. Do you call him daily, or at the end of each week, or whenever you happen to think about it? A. I turn it in every morning. Like I work at night, I turn it in in the morning.

Q. Before you start to work? A. Yes, sir.

Q. That is to say, yesterday if you worked ten hours, before you start out this morning you would call him up and say, "I spent two hours on overtime"? A. Yes, sir.

Q. Has he asked you for any details of it? A. No.

Q. He just takes that? A. He just takes what I give him.

Q. You say Mr. Schaefer told you to turn in overtime. When did he tell you that, and how? That is, I mean individually, or over the telephone, or by a letter? A. Over the telephone.

[Pp. 18/19, lines 13/14]:

Q. What I am trying to get at, Mr. Griffes, is—now you correct me, if I am wrong—I understood you to say that you take a bunch of these cards and sign them in blank and give them to your foreman? A. Yes, sir.

Q. Then you don't tell him? You never call him up and say, "I spent eight hours." You only call him when you have overtime. Is that correct? A. That is correct.

Q. You will call him up and say, "Yesterday I had so much overtime"? A. Yes. Like I put it in last night, why, I call him up this morning and say, "I put in two hours," or three hours, or four hours, whatever it took.

Q. You would tell him what it was for; that is, cleaning the screen, and so forth? A. Keeping the screen clean, or going out on the flume; or like there comes a break, or anything like that, and I have to go down and shut the water out of the flume.

Q. What I am getting at is: before you were told by Mr. Schaefer to put in overtime, did you just sign these cards up in blank and give them to your foreman? A. Yes.

Q. Then you didn't have anything to tell him about it? A. No.

Q. You just signed them up in blank and handed him a bunch of them, and got your pay check. Is that correct? A. That is correct.

[P. 21, lines 8-19]:

Q. Now, as a matter of fact, you don't have a great many places to go, do you? A. That's it. It takes a long time to get to them places, because they are way back in the mountains.

Q. Is there an auto road from your house to Three Rivers? A. Yes; there is an auto road.

Q. It isn't a paved road? A. There is seven and one-half miles of it that ain't paved.

Q. How long, ordinarily, does it take you to go to Three Rivers? A. Oh, an hour.

[Pp. 21/22, lines 24/4]:

Q. Could you give me an idea of approximately how many times a month you have occasion to leave? That is, regardless of whether you have to call or not, how often it is you want to leave your house? A. Oh, in the condition it is now, it wouldn't be more than maybe once a month, if it is that. That's as near as I can answer you.

[P. 24, lines 4-9]:

Q. Are you called out very often at night, either to clean the screen or tend to the flume? A. During the winter months, I am.

Q. During the summer and fall months you are almost never called out, are you? A. No.

[Pp. 25/26, lines 17/3]:

Q. I understood you at the start to say that you walked the flume three days a week? A. That is right.

Q. What do you do the other two days? A. I cut brush and, as I told you in there, clean lumber piles, and stuff like that. You see, the brush grows over the flume and up against the flume; in other words, the right of way.

Q. Now, you walk the flume three days a week even when you were working six days a week? A. Well, when I worked six days a week, why, that would bring it more

than three times a week, because I walked it every other day.

[Pp. 29/31, lines 1/2]:

Q. Weren't you, all the time you were paid time and a half for the sixth day, also paid time and a half for any night work? A. Yes.

Q. That has been longer than a year, Mr. Griffes. I mean, I think it has. I can't testify. A. Well, that was as near as I could tell.

Q. That is merely your best recollection? A. Yes. That's all I can say. It might have been longer, and it might have been—as near as I can tell.

Q. Now, these days that you don't walk the flume, when you are cutting brush, or lumber, about how many hours do you put in on that? A. Eight hours.

Q. Eight hours? A. That is right.

Cross-Examination

By Mr. Sokol:

Q. Now, when were those eight hours put in? Did you have regular hours? A. Yes.

Q. Every day? A. Every day.

Q. What were those hours? A. 7:30 in the morning until 4:30 at night.

Q. Did anyone tell you that you would have to follow each and every day those particular hours of work? Did Mr. Schaefer tell you that? A. Yes.

Q. All the time that you have been working up there in the last three years, have you followed that routine, 7:30 to noon, and then an hour off for lunch, and from 1:00 to 4:30? A. Yes. Well, as I told you before, when I go over the flume, why, I don't take no lunch with me, and go right through.

Q. You don't take a lunch at noon? A. No.

Mr. Sterry: He just makes a continuous trip.

The Witness: In other words, when I get back I take my hour off for dinner.

Q. By Mr. Sokol: But my question is: do you regularly work from 7:30 a. m. to 4:30 p. m.? A. Yes, regularly.

Q. With an hour off for lunch? A. Yes.

Q. After that time where do you go; to your home? A. Yes.

Q. Do you pay rent to the Company? A. No.

Q. You have your own home? A. I have my own home.

[Pp. 31/32, lines 23/1]:

Q. When do you get paid after your regular shift ends at 4:30 p. m.? When do you get paid for work after that time? A. Whenever I am called out.

Q. Called out from where? A. From home.

[Pp. 35/36, lines 19/2]:

Q. Assume that after 4:30 p. m. there is a call for you to go out. The alarm rings and you have to go out,

and it takes you a half hour. That is all the time you get paid for is that half hour that you spent doing the work on that alarm call? A. Yes.

Q. Otherwise, the time between 4:30 p.m., and the time that the alarm rang, you don't get paid for that?

* * * * *

A. No.

[Pp. 36/37, lines 23/11]:

Q. Did anyone tell you that the only time you would get paid overtime for was the time you actually did work after 4:30 p.m.? A. Yes.

Q. Who told you that? A. The Chief.

Q. The Chief of these plants? A. Yes.

Q. Who is that; Schaefer? A. Yes.

Q. What did he tell you? A. He said any time that I was called after 4:30, why, I get paid time and a half for it.

Q. Just for the time you spent out working? A. Yes.

[P. 38, lines 6-16]:

By Mr. Sterry:

Q. Normally, and after you have finished your patrol of the flume, or after you have finished your work on the cutting of brush around the flume, or lumber piles, you can do anything you please, so long as you can hear the alarm, or stay close enough to hear the alarm in case they need you. Isn't that correct? A. Yes; I guess that would be correct.

Q. You said you weren't free to go and visit anyone. There isn't anyone around there to normally go and visit, is there? A. There is nobody to go and visit.

III.

Average Time Per Day Required to Perform Active Duties as Indicated by Recapitulation of Station Logs and Record of Time Worked [Deft. Exs. B-1-S-6.]

Although the actual time required per operation is undoubtedly much less, we have used the following time allowances for the performance of the indicated operations:

Station Inspection	15 minutes
Reporting to Switching Center	10 minutes
Street Light Switching	15 minutes
Log Entry	5 minutes

ANDERSEN, H. L.
CASITAS

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
June 1942	3.03	69.6	Dec. 1942	2.80	64.4
July 1942	2.65	58.3	Jan. 1943	3.13	75.2
Aug. 1942	3.00	66.0	Feb. 1943	2.50	57.4
Sept. 1942	3.03	63.6	Mar. 1943	2.61	62.7
Oct. 1942	2.58	56.7	Apr. 1943	2.84	68.2
Nov. 1942	2.93	61.5	May 1943	2.65	61.0

BOYNTON, H. A.
CARDIFF

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	2.50	52.4	June 1942	4.52	76.8
Apr. 1942	2.41	50.5	July 1942	2.56	33.3
May 1942	2.54	55.8			

DICKERSON, E. K.
BEVERLY HILLS

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	1.49	34.2	May 1942	1.63	37.4
Apr. 1942	1.51	30.1	June 1942	1.30	13.0

EDGERTON, M. M.
BEVERLY HILLS

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	1.99	21.9	Oct. 1942	1.16	8.1
Apr. 1942	1.30	27.3	Nov. 1942	1.27	27.9
May 1942	2.44	53.6	Dec. 1942	1.17	26.8
June 1942	1.50	37.4	Jan. 1943	1.17	24.5
July 1942	1.15	26.4	Feb. 1943	0.98	19.6
Aug. 1942	1.95	41.0	Mar. 1943	1.20	27.6
Sept. 1942	0.75	6.7			

ELLINGFORD, E. L.
ANITA

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Feb. 1943	1.56	25.0	Apr. 1944	1.35	35.2
Mar. 1943	2.00	46.0	May 1944	1.43	37.3
Apr. 1943	1.74	40.1	June 1944	1.67	25.0
May 1943	1.19	32.0	July 1944	2.24	56.0
June 1943	1.34	33.5	Aug. 1944	1.33	35.9
July 1943	1.70	46.0	Sept. 1944	2.07	53.7
Aug. 1943	1.19	27.4	Oct. 1944	1.41	35.2
Sept. 1943	2.15	55.7	Nov. 1944	1.58	41.0
Oct. 1943	1.27	33.1	Dec. 1944	0.99	26.8
Nov. 1943	1.54	36.9	Jan. 1945	1.25	32.2
Dec. 1943	1.16	25.6	Feb. 1945	1.61	37.1
Jan. 1944	1.75	45.4	Mar. 1945	1.55	41.8
Feb. 1944	1.74	43.6			
Mar. 1944	1.45	37.7			

FRAZIER, CLARENCE R.
TERRA BELLA

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	0.56	12.8	Sept. 1942	0.55	12.6
Apr. 1942	0.53	10.5	Oct. 1942	0.74	16.3
May 1942	0.84	19.3	Nov. 1942	0.61	12.9
June 1942	1.02	20.4	Dec. 1942	0.75	17.2
July 1942	0.58	7.5	Jan. 1943	0.94	21.5
Aug. 1942	0.58	12.8	Feb. 1943	0.76	16.7

HANLON, P. G.
SOMERSET

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Apr. 1944	1.04	27.1	Oct. 1944	1.27	33.1
May 1944	1.70	44.1	Nov. 1944	1.23	31.9
June 1944	1.45	39.1	Dec. 1944	1.52	39.5
July 1944	1.43	37.2	Jan. 1945	1.30	36.5
Aug. 1944	1.74	46.9	Feb. 1945	1.02	24.4
Sept. 1944	1.41	39.5	Mar. 1945	1.00	26.0

HORNE, O. G.
PEDLEY

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Nov. 1942	0.97	20.3	Feb. 1943	0.73	14.6
Dec. 1942	1.18	27.1	Mar. 1943	0.95	21.8
Jan. 1943	1.96	39.2	Apr. 1943	0.92	20.2

HOSTETLER, W. S.
REDLANDS

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Oct. 1944	2.62	34.1	Apr. 1945	1.60	40.0
Nov. 1944	1.25	32.5	May 1945	1.13	31.7
Dec. 1944	0.98	25.4	June 1945	0.82	20.5
Jan. 1945	1.23	32.1	July 1945	1.46	39.4
Feb. 1945	1.08	26.0	Aug. 1945	1.68	43.7
Mar. 1945	1.85	50.0	Sept. 1945	1.11	26.6

JOHNSON, FRANK
INGLEWOOD

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Apr. 1942	1.84	36.7	Oct. 1942	2.55	56.0
May 1942	2.46	56.6	Nov. 1942	2.35	49.3
June 1942	2.15	42.9	Dec. 1942	2.33	53.5
July 1942	2.32	53.4	Jan. 1943	2.19	39.4
Aug. 1942	2.97	65.4	Feb. 1943	1.75	34.9
Sept. 1942	2.05	36.9	Mar. 1943	1.43	30.0

KANEEN, H. S.
CARPENTERIA

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	2.56	51.1	Sept. 1942	2.43	51.0
Apr. 1942	2.75	60.5	Oct. 1942	2.35	54.1
May 1942	2.86	65.8	Nov. 1942	2.71	32.5
June 1942	2.80	61.4	Dec. 1942	2.69	61.9
July 1942	2.40	55.2	Jan. 1943	2.36	54.2
Aug. 1942	2.06	45.4	Feb. 1943	2.47	54.3

LARSEN, G. F.
MACNEIL

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Apr. 1943	1.55	18.6	July 1943	1.80	39.7
May 1943	1.63	43.9	Aug. 1943	1.88	48.8
June 1943	2.04	48.9	Sept. 1943	1.35	31.1

MAYES, H. E.
WESTFLOR

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
July 1944	0.95	25.6	Jan. 1945	0.93	24.2
Aug. 1944	0.64	18.5	Feb. 1945	1.64	41.1
Sept. 1944	1.23	31.9	Mar. 1945	1.45	37.8
Oct. 1944	1.52	42.5	Apr. 1945	1.06	27.6
Nov. 1944	1.03	25.8	May 1945	1.10	28.5
Dec. 1944	1.40	37.7	June 1945	0.72	18.7

MOSES, B. E.
MACNEIL

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Jan. 1943	1.76	31.6	Mar. 1943	1.67	38.4
Feb. 1943	2.49	37.4	Apr. 1943	1.53	19.9

STARK, G. W.
GANESHA

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	3.02	69.5	Sept. 1943	2.10	31.5
Apr. 1942	2.50	50.0	Oct. 1943	1.46	36.6
May 1942	2.60	59.9	Nov. 1943	1.60	40.0
June 1942	2.55	50.9	Dec. 1943	1.19	32.2
July 1942	3.27	75.1	Jan. 1944	1.19	32.1
Aug. 1942	2.08	27.0	Feb. 1944	1.40	34.9
Sept. 1942	2.59	51.7	Mar. 1944	1.30	33.9
Oct. 1942	2.18	50.2	Apr. 1944	1.47	38.2
Nov. 1942	2.26	47.4	May 1944	1.16	31.3
Dec. 1942	1.60	38.4	June 1944	1.41	36.6
Jan. 1943	2.21	46.5	July 1944	0.85	17.0
Feb. 1943	1.04	20.8	Aug. 1944	1.23	27.0
Mar. 1943	1.17	26.8	Sept. 1944	1.42	31.2
Apr. 1943	1.75	36.8	Oct. 1944	1.67	45.0
May 1943	1.09	24.0	Nov. 1944	1.24	31.1
June 1943	1.78	42.6	Dec. 1944	1.01	27.2
July 1943	0.95	19.0	Jan. 1945	1.29	34.8
Aug. 1943	1.82	41.9	Feb. 1945	1.23	29.5

SWEITZER, E. N.
FULLERTON

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	2.32	53.4	Sept. 1942	2.90	66.7
Apr. 1942	2.37	47.3	Oct. 1942	2.83	68.0
May 1942	2.80	64.3	Nov. 1942	2.35	49.4
June 1942	2.44	24.4	Dec. 1942	2.72	62.6
July 1942	2.42	55.7	Jan. 1943	3.43	75.5
Aug. 1942	2.65	61.0			

TREGONING, A.
BIXBY

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1943	1.59	35.0	Sept. 1943	1.32	25.0
Apr. 1943	1.38	31.8	Oct. 1943	1.36	35.3
May 1943	1.64	42.7	Nov. 1943	1.32	34.4
June 1943	1.37	34.2	Dec. 1943	1.21	32.8
July 1943	1.31	34.1	Jan. 1944	1.24	31.1
Aug. 1943	1.30	32.6	Feb. 1944	1.30	32.6

WERT, V. V. B.
CARDIFF

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Sept. 1942	3.42	71.8	Dec. 1942	3.20	70.3
Oct. 1942	3.63	83.4	Jan. 1943	3.51	77.2
Nov. 1942	2.94	64.6	Feb. 1943	3.66	73.2

Range, Average Hours Per Day :

0.53 (Frazier—April, 1942) to

4.52 (Boynton—June, 1942).

Overall Average, Hours Per Day: 1.76.

IV.

The Portal-to-Portal Act Is Constitutional.

So far as we are advised, every court where the constitutionality of the Portal-to-Portal Act has been challenged has upheld it. Because of the number of the District Court decisions we limit our citations to those of the Circuit Court of Appeals. See:

Role v. J. Neils Lumber Co. (C. C. A. 9), 171 F. 2d 706;

Potter v. Kaiser Co (C. C. A. 9), 171 F. 2d 705;

Battaglia v. General Motors Corp. (C. C. A. 2), 169 F. 2d 254, Cert. den. 335 U. S. 887;

Fisch v. General Motors Corp. (C. C. A. 6), 169 F. 2d 266, Cert. den. 335 U. S. 902;

Seese v. Bethlehem Steel Co. (C. C. A. 4), 168 F. 2d 58;

Rogers Cartage Co. v. Reynolds (C. C. A. 6), 166 F. 2d 317;

Darr v. Mutual Life Ins. Co. (C. C. A. 2), 169 F. 2d 262 (cited in brief), Cert. den. 335 U. S. 871;

McDaniel v. Brown & Root (C. C. A. 10), 172 F. 2d 466;

Lasater v. Hercules Powder Co. (C. C. A. 6), 171 F. 2d 263.

The foregoing decisions have upheld the constitutionality of the Act upon one or more of the following established principles of constitutional law:

(1) A right given by statute before it has been reduced to final judgment may be modified or abolished by amendment or repeal of the statute. See:

Western Union T. Co. v. Louisville & N. R. Co.,
258 U. S. 13, 20;

Kline v. Burke Constr. Co., 260 U. S. 226, 234;

*National Carloading Corp. v. Phoenix-El Paso Exp.
Inc.* (Tex.), 176 S. W. 2d 564, 567-580, Cert.
den. 322 U. S. 747;

U. S. ex rel. Rodriguez v. Weekly Publications
(C. C. A. 2), 144 F. 2d 186, 188;

City of Phoenix v. Drinkwater (Ariz.), 52 P. 2d
1175, 1177, 1178;

Fleming v. Rhodes, 331 U. S. 100, 107;

Pearsall v. Great No. R. Co., 161 U. S. 646, 673,
674;

Ewell v. Daggs, 108 U. S. 143, 151.

The rights given by the Fair Labor Standards Act were rights created by statute. See:

Culver v. Bell & Loffland (C. C. A. 9), 146 F. 2d
29, 31;

*Missell v. Overnight Motor Transportation Co.,
Inc.* (C. C. A. 4), 126 F. 2d 98, 100;

*Tennessee Coal, Iron & Railroad Company v. Mus-
coda Local No. 123, etc.*, 321 U. S. 590, 602;

Brooklyn Savings Bank v. O'Neil, 324 U. S. 697,
704-5, 708, 710-11;

Schulte v. Gangi, 328 U. S. 108, 115-6;

Asselta v. 149 Madison Avenue Corporation, 65
Fed. Supp. 385, 387-8;

149 Madison Avenue Corporation v. Asselta, 331
U. S. 199.

(2) If, on any theory, it can be held that the rights plaintiffs attempt to assert are contractual in whole or in part, such rights affecting and interfering with congressional control over commerce can be modified, impaired or abolished by Congress. See:

Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467, 476, 480-1, 482-3;

Norman v. Baltimore & O. R. Co., 294 U. S. 240, 302, 307-311, 316;

Addyson Pipe & Steel Co. v. U. S., 175 U. S. 211, 226-229;

Legal Tender Cases (Knox v. Lee, Parker v. Davis), 12 Wall. 457, 550-1;

State of New York v. United States, 257 U. S. 591, 600-601;

Gelfert v. National City Bank of New York, 313 U. S. 221-231;

Fleming v. Rhodes, 331 U. S. 100;

Philadelphia etc. Railway Co. v. Schubert, 224 U. S. 603, 613-4.

V.

The District Courts of the United States, Being Courts of Limited Jurisdiction, Cannot Proceed Unless at All Times the Record Discloses Jurisdiction. Where It Affirmatively Appears That the Court Is Without Jurisdiction, It Is the Duty of the Court to Dismiss the Action of Its Own Motion Whether the Point Has Been Raised by the Parties or Not.

“ . . . The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. *He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing* . . . If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty.”

McNutt v. General Motors Accept. Corp. (cited in our brief), 298 U. S. 178, 189.

See, also, to the effect that it is the duty of the Federal Court to dismiss of its own motion wherever the lack of its jurisdiction comes to its attention:

Fisch v. General Motors Corporation, Bateman v. Ford Motor Co. (C. C. A. 6th, 1948), 169 F. 2d 266, Cert. den. 335 U. S. 902;

United States of America v. Corrick, 298 U. S. 435;

Ellenwood v. Marietta Chair Co. (1895), 158 U. S. 105;

North Pacific SS Co. v. Soley, 257 U. S. 216;

Erickson v. Pac. Greyhound Lines (D. C. Cal.), 56 Fed. Supp. 938;

Industrial Union of Marine and Shipbuilding Workers v. New York Shipbuilding Corporation (D. C. N. J., 1948), 79 Fed. Supp. 104, 106;

Torquay Corp. v. Radio Corp. of America (D. C. N. Y., 1932), 2 Fed. Supp. 841, 844;

Kvos, Inc., v. Associated Press, 299 U. S. 269, 278-80;

Frank W. Clark v. Paul Gray, Inc., 306 U. S. 583.

“United States District Courts are courts of limited jurisdiction. Creatures of statute, they have only such jurisdiction as the statutes expressly confer, and this jurisdiction must always affirmatively appear . . . Whenever the question of jurisdiction of the federal District Court is presented, it will be presumed that the court is without jurisdiction unless the contrary affirmatively appears.”

Le Mieux Bros. Inc. v. Tremont Lumber Co. (C. C. A. 5), 140 F. 2d 387, 389.

VI.

The Portal-to-Portal Act Is Not Limited to So-called Portal or Preliminary or Postliminary Activities.

So far as we are advised, the contentions which the appellants advance in this case that, contrary to the clear language of the Act, it was intended to be limited to so-called portal activities, have not been passed on by any Court of Appeals. It has been presented a number of times to the District Courts and, wherever so presented, rejected.

In *Seese v. Bethlehem Steel Company*, 74 Fed. Supp. 412, 416, Judge Chestnut, in dismissing a suit brought prior to the Portal-to-Portal Act, said, in part:

“ . . . It will be noted that the Act in this respect is not limited to portal-to-portal activities as such but defines the essential characteristics of any alleged liability for non-payment of minimum wages or overtime compensation. *None* are to be compensable ‘except an activity which was compensable by either —’ contract, custom or practice. Furthermore, while the language includes the word ‘except,’ it seems entirely clear from the whole wording that the *exception is the only activity which is compensable*. Therefore the complaint is legally sufficient only when it alleges activities that are compensable under the Fair Labor Standards Act as amended by the Portal-to-Portal Act. Conversely, the complaint does not state a legal liability unless it alleges compensable activities.” (Emphasis by the Court.)

Seese v. Bethlehem Steel Co., 74 Fed. Supp. 412, 416.

The decision of the Court was affirmed by the Fourth Circuit Court of Appeals in *Seese v. Bethlehem Steel Company*, 168 F. 2d 58, but this point which we are now considering was ignored by the appellate court.

In *Boerkoel v. Hayes Mfg. Corporation*, 76 Fed. Supp. 771, 775, the District Court of Michigan said:

“Plaintiff contends that section 2 of the Portal-to-Portal Act is not applicable because his suit is not based on strictly portal-to-portal activities, that is, activities preliminary or postliminary to his principal activities. However, this contention ignores the plain wording of that section, which covers all activities and claims arising prior to the passage of the Act and determines the compensability of all activities during an employee’s day.”

Boerkoel v. Hayes Mfg. Corp., 76 Fed. Supp. 771, 775.

In *Bauler v. Pressed Steel Car Co., Inc.*, 15 Labor Cases, Par. 64,569, p. 73,743, the Federal District Court of Illinois in granting leave to plaintiffs to amend their complaint after the effective date of the Portal Act, said in part:

“The plaintiffs contend that this is not a ‘portal’ action because they performed guard duties on the way to their regular posts, such as checking for violations of fire regulations and stopping employees not having identification badges. *But the Portal-to-Portal Act applies to all actions under the Fair Labor Standards Act.* The issue therefore, whether or not this is a ‘portal’ action, *is whether the overtime sued for here is for an activity compensable by contract, custom or practice.*”

Plaintiffs' motion to file an amended complaint to allege the substantive and jurisdictional requirements of the Portal Act was granted in part (81 Fed. Supp. 172).

Bauler v. Pressed Steel Car Co., Inc., 15 Labor Cases, Par. 64,569, p. 73,747, p. 73,748.

See, also, to the same effect:

Shaievitz v. Laks (D. C. N. Y.), 80 Fed. Supp. 241;

Bateman v. Ford Motor Company (D. C. Mich.), 14 Labor Cases, Par. 64,353, p. 72,901, Affd. C. C. A. 6), 169 F. 2d 266, Cert. den. 335 U. S. 902;

Kemp v. Day & Zimmerman (Iowa), 33 N. W. 2d 569.

VII.

A Contract of Employment Containing a Provision Similar to Bulletin A-36 That the Employees Would Be Paid a Definite Hourly Wage or a Specific Weekly or Monthly Salary and Time and a Half for Work in Excess of Forty Hours Per Week Is Not Sufficient to Meet the Requirements of the Portal Act, in That It Does Not Specify the Particular Activities That Are to Be Paid for and That Under the Portal Act It Is Necessary to Expressly Promise to Pay for the Particular Activities for Which Compensation Is Sought.

In *Kemp v. Day & Zimmerman, Inc.* (not yet officially reported—Iowa), 33 N. W. 2d 569, 577-8, defendant was engaged in the manufacture of munitions for the Federal Government. Plaintiffs were employed at a specific hourly rate, with no overtime compensation, defendant believing they were exempt from the provisions of the original statute. After severing their connection with defendant and before the passage of the Portal Act, plaintiffs instituted suit to recover overtime compensation, liquidated damages and attorney's fees. The case coming on for trial shortly after the effective date of the Portal Act, defendant moved for a continuance, which was denied. Judgment being rendered for plaintiffs, defendant after the effective date of the Portal Act, moved for a new trial, which was likewise denied.

The Supreme Court of Iowa reversed the case, saying, in part:

"The only basis of the claims which we find in the printed or certified record is a statement in paragraph one of the resistance to defendant's motion to vacate the judgments and for new trial, viz.: '* * * that all of the plaintiffs in the consolidated actions

sought and are seeking therein to recover for overtime work during the ordinary working day while in the employment of the defendant, *such work being compensable as overtime by custom and practice in effect at the time of such employment and service.* (Italics supplied.) There is no evidence even tending to support or sustain the italicized statement. The plaintiffs, of course, were employed by defendant. Whether it was by written or verbal contracts does not appear. But the fact that there may have been contracts of employment is not sufficient to sustain recovery in this action. To aid the plaintiffs such contracts, if any, *must each have contained an express provision that the defendant agreed to pay the employee compensation for the overtime alleged to be due him.* No contract containing any such express provision is claimed, alleged or proved by any plaintiff. The court made no such finding."

As to the constitutionality of the Act, followed by a consideration of the applicability of the statute to the instant case, the court continued:

"We have set out the extent of the combined arguments on the point. Neither side has cited any decision or authority. Each relies upon the language of the statute. It is clear and unambiguous. *Just two essentials for compensability are stated—an express provision of a contract, or a custom or practice.* They are the requisites of both section 2(a), subsections (1) and (2), and of section 2(b). *Everything else is eliminated.* The kinds of activities are not designated or delimited. But to be compensable or within the jurisdiction of the court, the requirements of section (a) and (b) must be met. Even if the activity be 'work done within the workday proper,' as plaintiffs assert was the case, it must be 'under

such contract provision or such custom or practice.’
It is so stated in section 2(b).”

* * * * *

“The Portal-to-Portal Act makes an express provision in a contract, in effect during the overtime, or a custom or practice in effect at said time the *sine qua non* of recovery, without regard to the nature of the overtime activity. *An implied contract or one in contemplation of law does not comply with the Act.*”

Kemp v. Day & Zimmerman, Inc. (Iowa, 1948),
33 N. W. 2d 569, 577-578, 590, 591.

Sadler v. W. S. Dickey Clay Mfg. Co. (D. C. Mo.),
78 Fed. Supp. 616. Action was instituted prior to the Portal Act for preliminary and postliminary activities. After the effective date of the Portal Act, motion to dismiss was granted with leave to amend, and plaintiffs filed an amendment substantially similar to the third amended complaint in the instant cases, wherein it was alleged in the language of the Portal Act that the activities were compensable by an express provision of a contract and by custom and practice, without specifying or setting out the provisions of the alleged contract or the facts constituting the alleged custom and practice.

In dismissing the complaint the court, in part, said:

“ . . . It seems manifest from the method adopted by Congress in so delimiting the jurisdiction of courts to hear and determine claims arising under the Fair Labor Standards Act, as amended, that Congress intended *that before an employee could invoke the*

jurisdiction of the courts in the enforcement of such claims, the employee should affirmatively and distinctly establish by facts his right to maintain such action and the jurisdiction of the court thereover.

. . . The general allegations contained in the amended complaint do not comport with the intent and purpose of such order. Under the established rule, that a plaintiff suing in a Federal Court must show in his petition, affirmatively and distinctly, the existence of whatever is essential to Federal Jurisdiction, we believe that under Section 2(d), *supra*, of the Portal-to-Portal Act of 1947, plaintiffs, relying upon a contract, *must allege the express provision of such contract that would authorize the payment of compensation for the particular activity claimed; or if relying upon a custom, that he should allege facts from which the custom or practice may be inferred that would make such activities compensable.*"

Sadler v. W. S. Dickey Clay Mfg. Co. (D. C. Mo.), 78 Fed. Supp. 616, 618.

In *Plummer v. Minn., etc., Co.* (D. C. Minn.), 76 Fed. Supp. 745 (cited and quoted from in our brief), plaintiffs were guards at defendant's plant during the war and seek recovery for time spent walking to and from their posts of duty, cleaning their firearms, changing clothes, etc. Defendant moved for summary judgment on the grounds that defendant conclusively showed that the action did not fall within the exceptions noted in the Portal Act, *i. e.*, there was no express contract or custom or practice to compensate plaintiffs for the type of activity for which

compensation was sought. Plaintiffs claimed that their activities sued for were made compensable by reason of the fact that they had been told they would be paid for all work at a definite hourly rate. In rendering summary judgment for the defendant the court, in part, said:

“The only response which plaintiffs make to the showing that there was no express provision of any written or non-written contract which would sustain their right of recovery under the Portal-to-Portal Act is to state that when these men were hired they were told they would receive so many cents per hour for all work performed. Clearly, such a showing, in view of the type of activities alleged to have been performed, would not sustain recovery under the Act. *It is conceded that the parties did not agree in the employment contract that the services enumerated were to be compensable.* Plaintiffs worked at defendant’s plant for some three years and were paid for the straight time and overtime that they worked as guards pursuant to any individual contract of employment or any collective bargaining contract. It was some months after their employment terminated that they first made a claim for compensation by reason of the specific services enumerated above. In order to sustain a recovery under the Portal-to-Portal Act, plaintiffs must establish an express provision in a written or non-written contract between the parties to the effect that plaintiffs were to be compensated for these specific services. The claimed basis for their recovery herein as indicated by this showing is the very situation which apparently motivated Congress in passing the legislation now commonly referred to as the Portal-to-Portal Act. *It seems elementary that the conditions of that Act are not met by the implied contract claimed to be based*

on the general employment contract which is set forth in plaintiffs' affidavit."

Plummer v. Minn., etc. (D. C. Minn.), 76 Fed. Supp. 745, 746.

Colvard v. Southern Wood Preserving Co. (D. C. Tenn.), 74 Fed. Supp. 804, plaintiffs claimed overtime for time spent traveling to and from the place of work on the employer's premises and in changing clothes, obtaining and replacing tools, etc. On motions by both plaintiffs and defendants for summary judgment.

Plaintiffs contended that a provision in the employment contract to the effect that they would receive time and one-half for overtime constituted an express contract coming within the exception of Section 2 of the Portal Act.

In denying this contention and rendering judgment for defendant, the court said:

"[2] My judgment is that the contract for the payment of overtime, as intended by the Congress in the Portal-to-Portal Act of 1947, must be an express or written contract *concerning the particular time for which overtime compensation is sought.* I think the general provision in the employment contract to pay time and one-half for overtime has no significance in determining the number of hours in a work week. This would be true had there been no Portal-to-Portal Act of 1947."

Colvard v. Southern Wood Preserving Co. (D. C. Tenn.), 74 Fed. Supp. 804, 805.

Finn, et al. v. Bethlehem Steel Company (D. C. Mass.), 15 Labor Cases, Para. 64,592, p. 73,847—Action for overtime compensation for preliminary and postliminary activities. In holding that the action would be dismissed failing a proper amendment, the Court stated:

“In the above case the plaintiff has filed a motion to amend his cause of action and, after detailing certain work which the employees performed for a fifteen-minute period just prior to the commencement of production and other work at the defendant’s plant states as a conclusion that ‘. . . these aforementioned activities were compensable by the express provisions of contracts of employment . . .’. The plaintiff has been allowed to amend his complaint to show the jurisdiction of this Court. Merely suggesting that the activities for which compensation is sought were compensable by the express provisions of a contract of employment is not sufficient to show the jurisdiction of this Court. The plaintiffs in this case are numerous, and the records of the defendant must be subject to much search and scrutiny by both parties before trial. It is therefore quite essential that jurisdiction should be clearly established before proceeding with such a vast task. *It cannot be established by tortuous reasoning as to the construction of a contract. The statute calls for a clear and express provision of a contract making the time for which compensation is sought compensable in fact and in law.*

“Having in mind the provisions of Rule 8(a) of the Federal Rules of Civil Procedure and the previous

decision in this case, *and in the absence of a specification of the express provision of the contract relied upon, the action must be dismissed.* If such a provision can be set forth in its own language, the plaintiff will have ten days in which to move to amend. Otherwise, the motion to dismiss is allowed.” (P. 73,847.)

Finn, et al. v. Bethlehem Steel Company (D. C. Mass., 1948), 15 Labor Cases, Para. 64,592, p. 73,847.

Smith v. Cudahy Packing Co. (D. C. Minn.), 76 Fed. Supp. 575, appeal dismissed 172 F. 2d 223, was an action to recover compensation for time spent changing clothes and engaging in duties preparatory to commencing and after concluding work. The action was filed prior to the enactment of the Portal Act.

After the enactment of the Portal Act, defendants moved in the alternative for dismissal or for summary judgment, and supported the motions by affidavits, on the grounds of (1) lack of jurisdiction over the subject matter, and (2) failure to state a cause of action.

Plaintiffs then amended their complaint so as to allege that the activities for which compensation was sought were compensable by contract and by custom or practice.

The supporting affidavits of the defendants were to the effect that there was no custom or practice to pay for the activities involved, and further that there was no contract between the parties to do so, and that a collective bargaining agreement in existence at the time had been complied with.

Plaintiffs' affidavits in each case were to the effect that there was a contract as well as a custom and practice to pay for the activity. Plaintiffs argued that a trial of 1700 claims might establish that they are cognizable even in the face of the Portal Act.

In granting defendants' motion for summary judgment the Court said:

"The amendment to the complaints, consisting of a general allegation that the compensation here sued for was based on 'express provisions of nonwritten or written contracts in effect at the time such work activities were performed by plaintiffs herein, and that such work activities were compensable by custom or practice' in my opinion is not sufficient to avoid the very specific prohibition of the Portal Act. The affidavits furnished by plaintiffs do not add what the complaints lack in plaintiffs' cases, so as to circumvent what Congress clearly withdraws."

* * * * *

"The record now before the Court is such that the question of jurisdiction can be determined on the motion for summary judgment."

Smith v. Cudahy Packing Co. (D. C. Minn.), 76 Fed. Sup. 575, 579, 581, appeal dismissed 172 F. 2d 223.

VIII.

The Requirement of the Defendant That Its Primary Servicemen After the End of Their Shift Should Always Advise It Where They Could Be Reached by Telephone in Case Their Services Were Needed Did Not Entitle Them to Overtime Compensation.

In *Dumas v. King* (C. C. A. 8th), 157 F. 2d 463, plaintiff was a stationary engineer in defendant's plant. He sued for overtime compensation. It seems to have been conceded that he put in more than forty hours a week at the plant, but defendant claimed that the plaintiff was an executive. The District Court found to the contrary and allowed him overtime compensation and liquidated damages for the amount of time which the court found plaintiff had worked in excess of forty hours per week at defendant's plant, but denied recovery for time after plaintiff left the plant, plaintiff's claim being that after he left the plant he was required to remain in telephone touch with defendant in order to respond in case of an emergency. The defendant appealed and plaintiff cross-appealed. The judgment was affirmed. In denying the cross-appeal the court said in part:

"Nor does the contention merit serious consideration that the court as a matter of fact should have held that King was on duty 24 hours a day, because it had been agreed that he might be called to the plant from his home at any time, if something went wrong with the machinery. The evidence shows that he was free to go where and do what he pleased during this alleged waiting time, and that he did so, only advising the plant where it would be possible to reach him in case of an emergency.

“The Supreme Court said in *Skidmore v. Swift & Co.*, 323 U. S. 134, 136, 137, 140, 65 S. Ct. 161, 163, 164, 89 L. Ed. 124: ‘We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. * * * This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. * * * Each case must stand on its own facts.’

“In the present case, the trial court plainly was warranted in finding that King was not ‘engaged to wait’ after he left the plant, but that he merely ‘waited to be engaged.’ ”

Dumas v. King (C. C. A. 8th), 157 F. 2d 463, 466.

In *Super-Cold Southwest Co. v. McBride* (C. C. A. 5th), 124 F. 2d 90, judgment was given for the plaintiff for overtime compensation and liquidated damages and attorney’s fees. On appeal the plaintiff sought reversal on the grounds: (1) It was a retail establishment exempt under the act; (2) that the plaintiff’s evidence showed he was engaged in both interstate and intrastate commerce and the evidence did not show what part of his overtime work was in interstate commerce; (3) so much of the judgment as allowed for overtime for “on call” time on Sunday

was erroneous. The appellate court denied the first contention and sustained the last two, saying as to the third:

“It was error to allow plaintiff for the time set up in his Exhibit A, as ‘Sundays on call’ without further explanation, a recovery for 12 hours overtime each day. Putting aside the unreasonableness of the claim that because he was ‘on call’ on Sunday he was ‘at work’ for 12 hours, when eight hours was his work day, we think it clear, that the mere statement that he was ‘on call’ without more, in the face of the record which shows that a person ‘on call’ merely had to leave his telephone number or place where he could be found, is not proof that he was engaged in work either regular or overtime within the meaning of the Fair Labor Standards Act. For the failure of the proof in these respects, the judgment is reversed and the cause is remanded with directions to ascertain and allow plaintiff for, the amount of actual overtime he worked in interstate commerce including therein all time worked in such commerce whether on Sunday or any other day *and excluding therefrom all time claimed when the claim is merely for being ‘on call’ without more.*”

Super-Cold Southwest Co. v. McBride (C. C. A. 5th), 124 F. 2d 90, 92.

In *Barker v. Georgia Power & Light Co.* (D. C. Ga., 1942), 2 WH Cases 486, the district court for Georgia, in denying plaintiff’s overtime compensation for on-call time, said:

“The time after the regular work-day during which plaintiffs were available and ‘on call’ in the event of trouble or an emergency, was not hours worked, and plaintiffs are not entitled to compensation for such time spent ‘on call’ when no actual work was per-

formed by them. This finding is supported by the three agreements entered into in 1939, 1940 and 1941 between the defendant and the local union, to which the plaintiffs belonged, and which will be hereinafter referred to more in detail, which agreements provide that 'hours worked' should include time actually at work or on duty, including the time required to stand-by prepared to go to work at a specific place. It is also supported by paragraph eight of Interpretative Bulletin No. 13, issued by the Office of the Administrator of the Wage and Hour Division on July 1, 1939 [1942 WH Man. 123] * * *"

* * * * *

"The time during which plaintiffs were only 'on call' and not on duty performing actual work for defendant, or standing by prepared to go to work at some specific place, is not hours worked and none of the plaintiffs are entitled to recover any sum as compensation for time spent 'on call.'

"The method used by defendant in calculating the compensation due plaintiffs for regular and overtime work was correct and in accordance with the several agreements entered into between defendant and Local Union No. 511 of the International Brotherhood of Electrical Workers, and also in accordance with the Fair Labor Standards Act of 1938."

Barker v. Georgia Power & Light Co. (D. C., Ga., 1942), 2 WH Cases 486, 489, 494.

See to same effect:

Bohn v. B. & B. Ice and Coal Co. (D. C., Ky., 1946), 63 Fed. Supp. 1020;

Allen v. Arizona Power Corporation (D. C., Ariz., 1944), 8 Labor Cases, Par. 62,024. p. 65,862;

Thompson v. Loring Oil Co. (D. C., La., 1943), 50 Fed. Supp. 213.

IX.

If It Be Assumed That the Agreement of the Appellants' Employment Was a Violation of the Fair Labor Standards Act Prior to the Portal Act, the Contract of Employment Was Made Valid by the Portal Act.

In *Lasater v. Hercules Powder Co.* (C. C. A. 6,), 171 F. 2d 263, 265, the Sixth Circuit Court of Appeals in affirming judgment for the defendant, said:

“ . . . With regard to the contention of appellants that the Fair Labor Standards Act should be read into the contract of employment, it was said in *Seese v. Bethlehem Steel Co.*, 4 Cir., 168 F. (2d) 58, 65, [14 Labor Cases, Par. 64,515] where a similar argument was made, that ‘the true situation with respect to claims affected by the Portal-to-Portal Act is that that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that Act.’ The provisions of the Portal-to-Portal Act, striking down claims for overtime not based on contract, custom, or practice, are valid, and appellants, accordingly, in this case are not entitled to such compensation for overtime.”

Lasater v. Hercules Powder Co. (C. C. A. 6), 171 F. 2d 263, 265.

See, also:

Seese v. Bethlehem Steel Co. (C. C. A. 4), 168 F. 2d 58, 65;

Role v. J. Neils Lumber Co. (D. C., Mont.), 74 Fed. Supp. 812, 814, Aff. (C. C. A. 9) 171 F. 2d 706;

McNair v. Knott, 302 U. S. 369, 372-4;

Read v. Plattsmouth, 107 U. S. 568;

Watson v. Mercer, 8 Pet. 88, 111.

X.

Even Before the Portal Act, Where the Employment Was Such That It Was Difficult to Determine the Actual Amount of Work Performed, the Agreement of the Parties as to What Constituted Compensable Time Was Recognized and Upheld by the Courts, Provided It Was a Reasonable Agreement and Entered Into by the Parties in Good Faith.

Bowers v. Remington Rand, Inc. (C. C. A., 7th), 159 F. 2d 114, 116-117 (Cert. den.), 330 U. S. 843, is perhaps the closest factually to the instant situation. It was an action for overtime brought by defendant's employees under the act.

Plaintiffs were firemen employed by the defendant and worked under the "two-platoon" system. Under this system employees were required to remain within the plant area for 24 consecutive hours on alternate days. They were paid for 16 hours and during the remaining 8 they were free to sleep in facilities provided by defendant. Overtime was paid if the firemen were called to work during these 8 hours, but these calls were infrequent (105 hours out of 78,655). No restraints were placed upon the liberty or normal pursuits of the men during the 8-hour period other than that they sleep in the plant subject to call for emergency. During the 16-hour period the men engaged in various activities such as cleaning the station and equipment, attending classes, drills, etc.

"Upon these facts the court concluded that appellants and appellee had entered into a contract of employment under which appellants agreed to sleep at the plant subject to call, and that the sleeping period did not constitute working time" (p. 116).

From a judgment in favor of defendant plaintiffs appealed. In affirming the Court said (pp. 116-117):

“To be sure, agreements which violate the provisions or purposes of the Act will not be given effect. That rule is now settled; *that rule, however does not apply to an agreement to settle the question whether certain activity or non-activity constitutes work or employment.*

* * * * *

“Appellants, relying on the case of *Armour & Co. v. Wantock*, 323 U. S. 126, at page 133, 65 S. Ct. 165, at page 168, 89 L. Ed. 118, in which the court said, that ‘* * * an employer * * * may hire a man to do nothing * * * but wait for something to happen,’ and on *Skidmore v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124, in which the court in effect said that ‘waiting time’ may be working time, argue that they were on a 24 hour shift, restricted to fire stations or within hailing distance thereof, and wholly under the control and direction of appellee. They assert that they are entitled to compensation for their sleeping time solely because they remained at the plant subject to call or service in case of emergencies. In other words, what appellants in effect seek, is that the court make a new contract for the parties.

“After the close of all the evidence the trial court said: ‘Whether time may be compensable depends on circumstances of the case, and the mere fact that the employee was in some small degree deprived of some freedom of action doesn’t alone determine the question. The firemen were willing to keep themselves available for duty if called upon during their rest period, they were willing in consideration of their

employment as firemen to sleep on the premises * * *
With this statement we agree, since the facts show that appellants agreed to wait to be engaged, *Skidmore v. Swift & Co.*, *supra*, 323 U. S. 137, 65 S. Ct. 161, 89 L. Ed. 124; hence the time spent in sleeping is not compensable. See also *Rokey v. Day & Zimmerman*, 8 Cir., 157 F. 2d 734.”

Bowers v. Remington Rand, Inc. (C. C. A. 7th, 1946), 159 F. 2d 114, 116-117, Cert. den. 330 U. S. 843, 91 L. Ed. 1288.

Walling v. A. H. Belo Corp., 316 U. S. 624, 630-635, was on writ of certiorari to the Fifth Circuit Court of Appeals to review a judgment affirming a judgment of the District Court entering a declaratory judgment construing the FLSA and denying injunctive relief against an alleged violation. This case established the famed “Belo Doctrine” applying the term “regular rate” of the Act. No question as to what constituted working time was involved, but the Court said (pp. 630, 634):

“But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act.

* * * * *

“The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of ‘regular rate’ when Congress has failed to provide one. Presumably Congress refrained from

attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. *When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours.*"

Walling v. A. H. Belo Corp., 316 U. S. 624, 630, 634-635.

See also to same effect:

Tennessee C. I. & R. Co. v. Muscoda Local 123, 321 U. S. 590, 603;

Skidmore v. Swift & Company, 323 U. S. 134, 136-137 (cited in brief);

Jewell Ridge Coal Corporation v. Local 6167, 325 U. S. 161, 169-170.

XI.

Where a Contract Is Susceptible of Two Constructions, One of Which Makes It Fair and Reasonable While the Other Makes It Inequitable, Unusual, or Such as Reasonable Men Would Not Be Likely to Enter Into, the Latter Construction Must Be Disregarded and the Former Accepted.

In *Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota* (C. C. A. 8), 121 Fed. 609, 611, the Eighth Circuit Court of Appeals, in reversing judgment for the plaintiff, said, in part:

“Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract.”

Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota (C. C. A. 8), 121 Fed. 609, 611.

In *Cohn v. Cohn*, 20 Cal. 2d 65, 70, the will of Charles Cohn devised and bequeathed four-fifths of his estate to Levi Cohn, his brother, and one-fifth to the appellants who were other brothers and sisters, or children of deceased brothers and sisters. Probate of the will was contested by the appellants. Thereafter, a contract was en-

tered into between the appellants and Levi Cohn whereby forty-five per cent of the estate available for distribution was to be distributed to Levi Cohn and fifty-five per cent to the appellants. The contest was then withdrawn and the will admitted to probate. All inheritance and estate taxes were paid. A dispute arose between the appellants and Levi Cohn as to the allocation of taxes, appellants claiming they should be charged with an inheritance tax only on the one-fifth of the estate left to them. The Superior Court held they were entitled to fifty-five per cent of the estate remaining after all expenses of administration and inheritance taxes had been paid. In affirming judgment, the Supreme Court said (at p. 70):

“Another factor which is entitled to consideration in construing the agreement is that if the contention of the appellants were correct and \$94,886 of the tax is deducted from the interest of Levi Cohn under the will, the respondent will receive only about 30 per cent of the estate, based upon a market value of \$650,000. On the other hand, if the entire tax is deducted from the value of the estate before it is apportioned among the heirs, the respondent will receive 45 per cent of the amount ‘available for distribution.’ *Where one construction would make a contract unreasonable or unfair, and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one which must be adopted.*”

Cohn v. Cohn, 20 Cal. 2d 65, 70.

In *Stoddart v. Golden*, 179 Cal. 663, 665, suit was brought to foreclose a mortgage securing a promissory note which provided for payments in installments of "\$1000.00 on or before October 27, 1912, with interest at the rate of 7% per annum, payable at maturity; the sum of \$2000.00 on or before one year; the sum of \$2000.00 on or before two years; the sum of \$2200.00 on or before three years, with interest at the rate of 7% per annum, payable semi-annually." In affirming the judgment of the Superior Court which allowed interest on the entire sum, the Supreme Court said (at page 665):

"* * * It would be doing violence to accepted rules of construction to uphold the contention that the parties by their agreement manifestly intended to exclude the installments in question from the payment of interest and intended that only the first and fourth installments should bear interest. *A principle of construction well settled is that where one construction would make a contract unusual and extraordinary, and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail.*"

Stoddart v. Golden, 179 Cal. 663, 665.

See, also:

Stein v. Archibald, 151 Cal. 220, 223;

Caletti v. State, 45 Cal. App. 2d 302.

XII.

Where It Is Clear From the Record, as It Is Here, That Plaintiffs Cannot Prove an Applicable Contract, Custom or Practice Making the Services for Which They Seek Recovery Compensable, Not Only Is It the Duty of the Court to Dismiss the Proceedings, but Such Action Will Be Beneficial to Both Parties and Will Save Them the Time and Expense of Prolonged Litigation.

In *Johnson v. Park City Consolidated Mines Co.* (D. C., Mo., 1947), 73 Fed. Supp. 852, 857-858, the court in dismissing, after the effective date of the Portal-to-Portal Act, a suit for overtime compensation, said, in part:

“This action involves a large number of records and employees. It would require expenditure of large sums of money and time to get ready for trial and the trial would be long, in fact might even call for a master. Why go through such procedure, as suggested by plaintiffs, to reach a position that is now obvious from the record. If plaintiffs can prove a contract or custom as called for by the amended Act it should not be kept secret until the trial. Likewise if they cannot produce such evidence that should not be kept secret until the trial.”

Johnson v. Park City Consolidated Mines Co.
(D. C. Mo., 1947), 73 Fed. Supp. 852, 857-858.

In *Sadler, et al., v. W. S. Dickey Clay Mfg. Co.* (D. C., Mo., 1948), 78 Fed. Supp. 616, 618-619, the court in dismissing the suit for overtime compensation, said, in part:

“In light of the fact that plaintiffs, after being afforded an opportunity so to do, have failed to set forth or refer to any express provision of a con-

tract, or allege in their amended complaint any facts which establish the existence of a custom or practice under which the activities here asserted by them are made compensable; and, it now being made to appear that such matters do not in fact exist, we believe that defendant's motion to dismiss this action should be sustained. The expense of preparing this case for trial would be burdensome to all parties. At a trial on the merits, facts appearing such as are now made to appear in defendant's motion to dismiss, this Court would be compelled to then dismiss this action. The general allegations contained in the amended complaint should not, under the circumstances of this case, be held to be sufficient to cause the parties to undertake the burden of expense of preparing this case for trial when such a ruling seems evident and inevitable."

Sadler, et al., v. W. S. Dickey Clay Mfg. Co.,
(D. C. Mo., 1948), 78 Fed. Supp. 616, 618-619.

In *Smith v. Cudahy Packing Co.* (D. C. Minn., 1947), 76 Fed. Supp. 575, appeal dismissed 172 F. 2d 223, the court in granting defendants' motion for summary judgment said, in part:

"It seems to me that no good can be accomplished by assuming facts to exist that are not disclosed by the complaint or affidavits now on file. The amendment to the complaint does not attach any existing written contract, nor does it give any adequate factual description of nonwritten contracts or custom or practice. *Story v. Todd Houston Shipbuilding Corporation*, D. C., 72 F. Supp. 690.

"An orderly administration of justice, considering all the facts and circumstances, seems to oppose the necessity of requiring a trial of the large number of

claims here involved, and the expense incident thereto. The time consumed by all concerned would be considerable. The record would be large. Plaintiffs' insistence on jury trials seems inadvisable."

Smith v. Cudahy Packing Co. (D. C. Minn., 1947),
76 Fed. Supp. 575, 581, appeal dismissed 172
F. 2d 223.

In *Finn, et al., v. Bethlehem Steel Company* (D. C. Mass., 1948), 15 Labor Cases, par. 64,592, p. 73,847, the District Court of Massachusetts said:

"Merely suggesting that the activities for which compensation is sought were compensable by the express provisions of a contract of employment is not sufficient to show the jurisdiction of this Court. *The plaintiffs in this case are numerous, and the records of the defendant must be subject to much search and scrutiny by both parties before trial. It is therefore quite essential that jurisdiction should be clearly established before proceeding with such a vast task.*"

Finn, et al., v. Bethlehem Steel Company (D. C. Mass., 1948), 15 Labor Cases, par. 64,592, p. 73,847.

See, also:

Piantadosi v. Loew's Inc. (C. C. A. 9), 137 F. 2d 534, 536;

Plummer v. Minn., etc. (D. C., Minn., 1948), 76 Fed. Supp. 745, 746;

Carr v. Goodyear, etc. (D. C. S. D., Calif., 1945), 64 Fed. Supp. 40, 51;

Bartels, et al., v. Sperti, etc. (D. C. N. Y., 1947), 73 Fed. Supp. 751, 756-757;

Hornbeck v. Dain, etc. (D. C. Ia., 1947), 7 F. R. D. 605, 606-607;

Werner v. Milwaukee Solvay Coke Co. (Wis. Sup. Ct., 1948), 31 N. W. 2d 605, 606.

No. 12070
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

No. 12071

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

This brief is presented for the purpose of summarizing the contentions of the parties and clarifying their respective positions. Appellee's arguments, the cases cited, and the attempts to distinguish the cases and points relied upon by Appellants, do not raise any further issues nor present any contentions which have not been fully answered in Appellants' brief.¹

¹Appellants' brief shall be referred to by the letter "B." The brief of Appellee shall be referred to as "A. B." The Appendix to Appellee's brief shall be referred to as "Ap."

In substance, as Appellants' brief clearly states, the claims of Appellants are for overtime compensation for work performed and made compensable by a contract or custom to pay for such work, which claims were improperly disposed of by the lower Court in dismissing the actions without a full trial on the merits.

As we read the brief of Appellee, the contentions put forth in support of its position and in opposition to that of Appellants, may be stated to rest on the following propositions:

A. The Court acted properly in dismissing the action for lack of jurisdiction of the subject matter where it affirmatively appeared without contradiction that there was no conflict on any material issue.

B. The Portal-to-Portal Act bars the claims of Appellants.

C. There was no contract between the Appellants to pay for the work performed by Appellants for which recovery is sought because the specific activities for which compensation is sought are not set forth in the alleged contracts between the parties.

D. The affirmative defenses of good faith were established as a matter of law.

DISCUSSION OF THE CONTENTIONS OF APPELLEE.

I. Dimissal of the Action.

In summary, the contention made by the Appellee that dismissal was proper rests on the argument that dismissal for lack of jurisdiction is proper where it affirmatively appears that there is no conflict in any material issue of fact. With the abstract statement of the rule of law governing dismissal, we have no quarrel. However, the rule justifying dismissal where it affirmatively appears that the court is without jurisdiction, cannot be removed from the context in which the rule is meant to apply and be used indiscriminately as a justification for dismissal in cases like the ones at bar, where the evidence is in conflict and where the facts are put at issue by denials, affidavits, and depositions. The employment relationship existing between employer and employees is a composite of many facts, including the understanding of the parties, their conduct, the duties performed, and any number of factors, the true meaning of which may be ascertained only by a close inspection of all the facts by the Court.

Appellants have set forth the appropriate rules of law, governing situations where the facts are in dispute (B. 15-25). The attention of the Court is respectfully directed to the discussions therein set forth, where it clearly appears that the question of jurisdiction cannot be summarily disposed of on the basis of affidavits and conflicting evidence.

Appellee attempts to avoid the application of the appropriate rules of law by argumentatively proceeding on the assumption that the record is devoid of any dispute, and that its position is one which is acquiesced in by Ap-

pellants without contradiction. A mere examination of the mass of data presented by affidavit, deposition, and oral hearing, conclusively points to the insubstantial basis of Appellee's claim in this respect. Without wishing to be repetitious, we respectfully call the attention of the court to Appellants' brief, pages 13 and 14, where the facts in dispute are summarized with supporting record references. As an examination of these facts in dispute show, the very material issues constituting the nature of the employment relationship between Appellants and Appellee were at all times in conflict and at no time possessed of the simple clarity for which Appellee argues.¹

The very argumentative nature of the position of Appellee gives evidence of the existence of the disputes with respect to the facts.

As an example of the dispute existing on the facts, we wish to point out to the Court certain statements made by Appellee in its brief commenting on the facts and attempting to argue, insufficiently and improperly it seems at this stage of the proceedings, the merit of its factual position.

Appellee states as follows:

“Notwithstanding the claims of the resident employee appellants that they had a definite eight hour shift, *we believe we could have convinced any reasonable court or jury that the time in which it took them to perform their active duties between their first and last calls to the switching centers was much less than eight hours per day.* Indeed, an examination of the summary of the logs of the sub-station men which were introduced at the pre-trial hearing on November 18, 1946 [Deft. Exs. B-1 to S-6] show

¹See Appendix pp. 1 to 10 for statement of disputed facts.

that on the basis of time estimated by Mr. Lyons in his testimony [D. R. 117, 127], which is uncontroverted, the time required for their active duties about the sub-station would average between 1½ and 2 hours per day (App. pp. 115 to 120). It is true that in addition to that they were required to take care of their yards and station grounds, but it may be doubted whether that time should be computed under the Act. Even if it should, it only consumed a short time each day.

While in the depositions the appellants complain of the strain of answering call-outs, the exhibits U to CJ, introduced at the said pre-trial hearing show all recorded call-outs of the resident employee appellants and that as to each such appellant there were a number of months in which there were no call-outs at all, and that the call-outs of all resident appellants averaged one in 15.5538 days." (A. B. 20, emphasis added.)

In discussing the employment contract between the parties, Appellee gives evidence of a dispute in arguing the contentions of Appellants:

"Appellants argue that the bulletin constituted a direct promise to pay overtime for all time spent upon defendant's premises in excess of forty hours per week. It is clear that no such interpretation can be reasonably drawn from the language of the bulletin." (A. B. 30.)

In concluding that the contentions of Appellants are absurd, a position which certainly evidences a dispute between the parties as to the nature of their employment relationship, Appellee states:

"There is another legal principle which, independent of other considerations, would prevent such con-

struction. It is well settled that when there are two possible constructions of a written instrument, one of which will lead to fair and equitable results and the other to absurd and inequitable results, the former will be accepted.” (A. B. 32.)

Appellee further attempts to argue the facts by drawing conclusions from the conduct of the parties. It is of course elementary that conduct is a question of fact to be determined by a full trial of the issues.

Skidmore v. Swift & Co., 323 U. S. 134, 89 L. Ed. 124 (1944).

Appellee states:

“It is, of course, elementary that in interpreting a contract, the conduct of the parties may be considered. In this case, however, there is no need of relying on that rule, since the appellants claim that the contract itself was not wholly written but consisted of the bulletin, the employment, and *custom and practice*. When the conduct of the parties is considered, it is crystal clear that neither party interpreted the bulletin as containing any promise or agreement to pay overtime other than for emergency services performed during the nighttime hours.” (A. B. 33.)

Appellee further manifests the existence of a controversy concerning the employment relationship existing between the parties by argumentatively discussing Appellants’ construction of the employment agreement:

“Appellants’ argument that they understood the bulletin A-36 as promising pay for their standby time is absurd, in view of their conduct as disclosed by this record.

As we have pointed out, at the time of the issuance of those bulletins it was not usually supposed

that standby time was compensable, and it is clear that it was not being paid for by the defendant either before or after the revision of the bulletin of 1942 or 1943. Could any intelligent person have understood the bulletin as promising him compensation for standby time when at the time of his employment he was told that the job required him for five days a week to live on the Company's premises, and during those days to remain twenty-four hours a day close enough to the station house or his residence to be able to respond in case his services were needed for an emergency; that he would be paid overtime for any emergency work performed during the nighttime hours, and then, by bulletin, informed that he had no regular hours in which to perform his services but that forty hours should be considered a week's work, and he would be paid time and a half for any excess hours; that he was then instructed to show for his normal services eight hours, neither more nor less, regardless of whether he performed that amount of service, and to show as overtime only emergency services performed during the nighttime hours, and that his overtime compensation would be determined by computing his hourly rate on the basis that his monthly salary was paid for forty hours of service?" (A. B. 38-39.)

Without laboring the point, and without burdening this Court by the request that it fully examine the record in order to determine the confused state of the facts upon which the Court below improperly acted in summarily dismissing the claims of Appellants, it seems from the above discussion that there is no basis upon which the summary disposition by the Court below can be upheld by this Court (see B. 15-25).

The record is replete with instances of the contradiction existing on the facts constituting the employment relationship of the parties to the extent that it is impossible for one fully to understand that relationship without a minute and close examination of all the data. Certainly on the basis of the record it cannot be contended that it is clear and that it affirmatively appears that Appellants are entitled to no relief. The court should exercise its summary power with caution and not deprive litigants of their right to be heard on the merits. It is hard to imagine a situation where this truth is more appropriately applied than in these cases.

II. The Portal-to-Portal Act.

Appellee argues that no distinction may be made in the application of the Portal-to-Portal Act to portal-to-portal claims as such, and to the claims of Appellants here for work performed. It states that no case has made such a distinction notwithstanding the cases cited and discussed by Appellants at pages 28, 29, and 30 of their brief.

The Appellee seeks to distinguish the *Conwell* case by pointing to the distinction between the facts of that case and the facts with which we are here concerned. However, this distinction cannot be supported as an examination of the *Conwell* case will show. In *Conwell v. Central Missouri Telephone Co.*, 76 Fed. Supp. 398 (U. S. D. C. Mo., 1948), the Court sets forth the facts of employment of plaintiff as follows (76 Fed. Supp. 400):

“There is little dispute about the facts. Mrs. Conwell was employed as night telephone operator at Holden, Missouri, for approximately 20 years, and Miss Pinkepank was employed in the same capacity at Sweet Springs, Missouri, for a little longer period of

time. During all of that period of time plaintiffs were on what is termed an eleven-hour tour. They were required to go on duty at nine o'clock in the evening and to remain there until eight o'clock the following morning. They were paid for eight hours only until 1943. The difference between the time compensated for and eleven hours was designated as sleeping time, and a cot was furnished by defendant and placed in a room near the switchboard so that the operator might utilize such time as her duties permitted in rest or sleep. In 1943 an increase in pay was requested and additional compensation was allowed by reducing the sleeping time at Holden from three to two hours and at Sweet Springs from three to two and one-half hours. Thereafter, Mrs. Conwell was paid for nine hours and Miss Pinkepank for eight and one-half. The switchboards were located in buildings owned or leased and controlled by defendant and were not in the homes of the operators. There was no change in plaintiffs' duties after the passage of the Fair Labor Standards Act of 1938. There was no written contract of employment. At the beginning of the period for which overtime compensation is sought, plaintiff Pinkepank was receiving 32 cents per hour and plaintiff Conwell 33 cents per hour. Periodic increases ultimately raised the hourly wage to 40 cents. In 1943 when plaintiffs requested an additional wage increase, defendant simply shortened the sleeping time and increased the working time.

Defendant has about 25 exchanges in central Missouri. Sweet Springs has a population of about 1,800 and between 600 and 700 telephone patrons. Holden is slightly smaller in population and number of patrons. Plaintiffs are still employed by defendant.

The switchboards operated by plaintiffs are commonly known as drop boards. Whenever a call comes into the board a small metallic disk-like device attached to the switchboard drops and exposes an aperture into which a plug is inserted to form the connection. Many of the patrons of each of the offices are rural subscribers, and a number of such subscribers are on each line. It is not necessary for a patron on a rural line calling another patron on the same line to route the call through the exchange. Each patron on such a line has a designated 'ring' and answers when he recognizes his designated 'ring' or signal. But notwithstanding the fact that such calls are not routed through the exchange, when a call is placed by one subscriber to another subscriber on the same line, the drop to which the line is attached on the board falls, and it requires the manual effort of the operator to replace it. Also during electrical storms the drops on a board will often fall, and the operator must replace them before the lines are again available for use in making connections. Consequently during the entire period that plaintiffs worked for defendant, they were required to replace the drops after they fell at whatever time that might be during their hours of duty.

Several long distance lines were routed through each of the switchboards each night. These lines afforded long distance service to patrons of smaller communities where the switchboards were closed at early hours each night. These long distance lines were in addition to the regular lines serving Sweet Springs and Holden.

The operators were charged with the responsibility of making records of long distance calls. Occasionally they dusted the boards, and during the winter months they maintained the fire in the stove in their exchange.

However, their duties outside those of attending the switchboards, it seems to me, are of no consequence in determining whether they come within the provisions of the Fair Labor Standards Act.

The number of calls through each of the exchanges varied with the talking desires of the patrons. The load usually had decreased considerably by eleven o'clock or midnight. Thereafter, calls were infrequent. Often there were considerable periods of time when there were no calls, and other periods when calls were more numerous, requiring more constant attention to the board. Usually after the ordinary load began to decrease, an automatic, electric bell was turned on, and the operator was permitted to leave the board. If a call came through the board, the bell sounded, attracting the attention of the operator.

The operator was not permitted to leave the premises or the room in which the switchboard was located between the time she went on duty at nine o'clock in the evening and the time her tour of duty ended at eight o'clock the following morning. Whatever the requirements of the board were with respect to the number of calls to be serviced by her, she was required to be there. Although the evidence is silent as to the exact number of calls that went through after midnight, it does reveal that the number of such calls varied nightly. Some nights the operators were able to get several hours of uninterrupted sleep; at other times they were disturbed at frequent intervals and obtained very little sleep. Whatever time was used in actual attendance upon the switchboard in excess of eight hours per day prior to 1943, and in excess of eight and one-half hours for Pinkepank and nine hours for Conwell thereafter, was not compensated for by the defendant." (Emphasis added.)

There is no distinction in substance in the employment relations involved in the *Conzwell* case and the employment relations involved here. The Appellants, other than the primary service men, were required to remain on the premises to be available to perform whatever duties might arise, which is exactly the fact in the *Conzwell* case.

With reference to the application of the Portal-to-Portal Act to cases of this kind, it is well to set forth the position of the lower Court in the *Conzwell* case on the hearing on defendant's Motion to Dismiss. In *Conzwell v. Central Missouri Telephone Co.*, 74 Fed. Supp. 542 (U. S. D. C. Mo., 1947), the Court stated (74 Fed. Supp. 545):

"It is difficult to conclude that the Congress of the United States intended to deny jurisdiction of the Court over legitimate claims of employees who had actually worked many hours in excess of 40 hours permitted by the Fair Labor Standards Act. Nowhere was it insisted during the consideration of the Act that such claims were unfair or unjust or outside the scope of the Fair Labor Standards Act, nor were there any expressions indicating a desire to destroy any such claims, or the jurisdiction of the Court with respect thereto except in so far as it was necessary to deny jurisdiction with respect to the portal-to-portal pay cases which were not seeking compensation for actual services rendered for productive labor, but for traveling and waiting time and for other activities outside actual productive activities." (Emphasis added.)

The attention of the Court is respectfully directed to the discussion of the case of *Mauro v. Malcolm M. Slaughter & Co.* (U. S. D. C. N. Y., 1948), 14 Labor Cases, par. 64,299, p. 72,715 (B. 29-30).

In the case of *Hess v. du Pont de Nemours & Co.* (U. S. D. C., N. J., 1949), 16 Labor Cases, par. 65,084, p. 75,438, the complaint alleged in paragraph 7(a) that certain plaintiffs were actually employed for 8½ hours, one-half hour of which was designated as a meal period, and that the defendant curtailed the 30-minute meal period by directing the plaintiffs back to work at the end of 20 minutes. There was alleged Rule No. 1 of the Defendant's Rules & Regulations, as follows (16 Lab. Cases, par. 65,084 at p. 75,438) :

"In the event an employee works over 8 hours per day or over 40 hours per week, he will be paid in excess of 8 hours per day or over 40 hours per week."

It was further alleged in paragraph 7(b) of the complaint that the plaintiffs reported for certain work in advance of their shifts. Defendant moved to dismiss on the ground that the plaintiffs had failed to allege a contract to pay compensation for the particular time for which overtime compensation was sought. The court in refusing to dismiss paragraph 7(a) of the complaint stated (16 Lab. Cases, par. 65,084 at p. 75,439) :

"The situation herein is ruled by *Central Missouri Telephone Company v. Conwell*, 170 F. (2d) 641 . . . According to paragraphs 7(a) and (c) of the complaint at least, it is made to appear that the excess of work was achieved by encroaching upon the plaintiffs' uncompensated meal periods."

The Court, however, adopted a different position with respect to the pre-shift time for which compensation was sought in paragraph 7(b). Since there was no contract, custom or practice alleged, paragraph 7(b) of the complaint which involved portal activity was ordered dismissed. This case points up the distinction to be made in the treat-

ment of claims for non-portal activities and claims for portal-to-portal activities. The Court applied the rule of *Central Missouri Telephone Company v. Conwell* with respect to the claims for work as distinguished from the claims for portal-to-portal activity. This is a proper construction because it effectuates the intent of both the Fair Labor Standards Act and of the Portal-to-Portal Act. If the Court were to apply the Portal-to-Portal Act indiscriminately to all claims for work, then it would be a simple matter for an employer to escape his obligation under the Fair Labor Standards Act by engaging an employee to work with the reservation of no agreement to pay for such work. Such an interpretation of the two acts would render the Fair Labor Standards Act nugatory.

While it is true that there is conflict in the interpretation of the Portal-to-Portal Act, it seems necessary, in order to give effect to the requirements of the Fair Labor Standards Act, that the Portal-to-Portal Act be restricted to the application of those non-meritorious claims for portal-to-portal activities which were created by *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 90 L. Ed. 1515 (1946), and not indiscriminately and blindly applied to eliminate compensation to employees for work honestly given.

III. The Existence of a Contract to Pay for the Activities Performed by Appellants.

Appellee takes the position that Bulletin A-36 did not constitute a contract to pay for the activities performed by Appellants on the ground that it does not specify with particularity the activities that are to be compensated. In support of this position, Appellee points out that the recovery by Appellants would constitute a windfall and, further, that their claims are absurd.

Appellee seeks to rely upon the conduct of the parties as an aid to the construction of the employment agreement and seemingly takes the position that because they had not been paid for their services there was no contract to pay. This is a novel and ingenious rule of contract construction and its logical extension would bar all suits on contract on the theory that if there is no performance there is no contract.

Appellee dismisses the applicability of the case of *Joshua Hendy Corp. v. Mills*, 169 F. 2d 898 (C. C. A. 9, 1948), cited and discussed in Appellants' brief at pages 31, 32, and 33 as follows:

"Appellants assert (B. 31-3) that this Court had before it in *Joshua Hendy Corp. v. Mills*, 169 F. 2d 898, a contract substantially similar to that alleged here as being set out in Bulletin A-36. This is entirely erroneous. An examination of that case will show that waiting or standby time was not involved; that the contract in that case was a definite written one between the union and the appellants, and was in no wise similar to the bulletin." (A. B. 29-30.)

It will be noted that Appellee's attempted distinction rests on the assertion that waiting time was not involved in the *Joshua Hendy* case. This, however, is of no moment. The only issue is whether there is a contract to pay for work performed, and whether the work was performed. It is completely irrelevant to any consideration of the matter whether the work consisted in waiting or in the performance of other activities.

Appellee's further distinction rests on the assertion that in the *Joshua Hendy* case the contract was negotiated between the Union and the employer. It is difficult for us to

see why this is a distinction. If Bulletin A-36 is part of the contract of employment between Appellants and Appellee, there is no significance in the manner in which it is negotiated or in the means by which it comes into existence.

It is respectfully submitted that Appellants' position is governed by the decision of this Court in the *Joshua Hendy* case to the effect that where there is a contract to pay overtime for work performed, the employer must pay such overtime if the activities of the employee fall within the meaning of the phrase "work performed."

The contention of Appellants that Bulletin A-36 constituted a promise to pay for all work performed in excess of 8 hours per day receives further support in *Frank v. Wilson & Co., Inc.*, 172 F. 2d 712 (C. C. A. 7, 1948). There the plaintiffs were employed in the Mechanical Division of the defendant who was in the meat packing business. The scheduled shifts for the plaintiffs were from 8:00 A. M. to 12 M. and from 12:30 P. M. to 4:30 P. M. During the period, however, the plaintiffs were required to report and be ready for work at 7:55 A. M. They received no compensation for the five minutes before their shift began. The employment contract in effect provided as follows (172 F. 2d 715):

"Employees who are required to work over 8 hours in any one day * * * will be paid one and one-half times their regular rate for all such overtime hours."

The lower Court concluded that the five-minute period before the shifts of the plaintiffs began, constituted activities which were compensable by an express provision of the written contract and gave judgment for the plaintiffs.

On appeal, the Court, citing the *Joshua Hendy* case, held the activities compensable by contract, stating (172 F. 2d.....714.....):

“Defendant next cites the Portal-to-Portal Act of 1947 and legislative history pertaining thereto as an absolute bar to recovery under this action. It raised this defense by its amended answer as well as by timely motions at the trial. Sec. 2 of the Portal-to-Portal Act provides that no employer shall be subject to any liability under the Fair Labor Standards Act on account of failure to pay overtime compensation on account of any activity unless such activity was compensable by either (1) an express provision of a written or nonwritten contract, or (2) a custom or practice in effect at the time of such activity.

The employment contract with the union which represented all the plaintiffs, which was in effect during the period here in question, provided:

‘Employees who *are required* to work over 8 hours in any one day * * * will be paid one and one-half times their regular rate for all such overtime hours.’ (Italics added.)

The trial court found that the plaintiffs were required to commence their usual activities five minutes before the time defendant computed the start of their working day for payroll purposes. The court also found that the plaintiffs were required by the rule of the company to be dressed for work and punched-in by 7:55 A. M. Much of the work that they did immediately after punching in, such as receiving instructions, drawing materials, going from the shop to the place of work, and carrying tools, was the same type of activity that they carried on from time to time throughout the day. It must be kept in mind that these plaintiffs were maintenance men, who might re-

main on one job all day, or who might go from place to place in the plant and participate in half a dozen jobs on any given day.

In *Joshua Hendy Corp. v. Mills*, 169 F. 2d 898, the Court of Appeals for the Ninth Circuit reviewed a somewhat similar situation. At that plant the normal daily work shift was eight and one-half hours, less a half-hour lunch period. It was Engineer Mills' duty to give almost constant attention to the boiler, which customarily prevented his taking time off for the lunch period. Nevertheless he was paid for only eight hours work per day. The labor contract in force provided that overtime compensation would be paid for all 'work performed' over forty hours per week. The court held:

* * * It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the work week at 40 hours straight time and 8 hours overtime and further provides for the payment of overtime for all "work performed" in excess of 40 hours per week. Mills performed 11 hours work in excess of 40 hours within the meaning of the phrase "work performed." He was paid for 8 hours overtime only.'

We are bound by the finding of the district court that the plaintiffs were required to work five minutes in excess of the eight regular hours on each of the days indicated by the time cards in evidence (as compiled in the stipulation). We conclude that the activities of the plaintiffs were covered by an express provision of a written contract, and that the Portal-to-Portal Act of 1947 is not a bar to maintaining this action."

The Court, however, reversed on the application of the *de minimis* doctrine.

It is undisputed that the work of Appellants consisted of the performance of various types of duties. It consisted, without distinction, in actively performing some duty and of the duty of remaining on the premises in order to perform any other duties integral to the general employment requirement. The work of Appellants was a bundle of activities, all of which taken together constituted the totality of what is designated "work." Appellee cannot avoid its liability by arbitrarily removing from the category of work certain activities for which it did not desire to make compensation. We respectfully submit that Appellee has failed to point out where and in what manner the *Joshua Hendy* case does not govern and accordingly we submit that under the rule of that case Appellants are entitled to recover. They performed work in excess of 40 hours per week, which by the very terms of their contract was compensable at overtime rates.

Appellee further founds its position on the assertion that a recovery by Appellants would be absurd. We have no desire to argue this point at this time, but we merely wish to point out that it has never been regarded, as far as we know, in the history of American labor relations, that "absurdity" is the proper descriptive term to apply to the recovery by employees for work performed for and for the benefit of employers.

IV. The Good Faith Defense.

Appellee states that they have established affirmatively the defense of good faith made available to employers under Sections 9 and 11 of the Portal-to-Portal Act.

It would be only repetitious at this time to discuss this phase of the case. There is fully set forth in Appellants' brief at pages 39 to 49, a discussion of the nature of those defenses and their inapplicability to the Appellee.

Of course, in view of the summary disposition given these cases by the Court below, there cannot be determined at this time the validity or invalidity of those defenses as put forth. However, we wish to direct the attention of this Court to pages 18, 19 and 20 of Appellants' brief where the rule is stated that defenses under Sections 9 and 11 of the Portal-to-Portal Act cannot be dismissed by summary disposition where the facts are put in issue by conflicting affidavits.

Conclusion.

It is respectfully submitted that Appellants' position as set forth in their opening brief has not been destroyed by the arguments of Appellee and, under the appropriate rules of law as therein set forth, the Judgments of Dismissal of the Court below should be reversed.

Respectfully submitted,

DAVID SOKOL and
PACHT, WARNE, ROSS & BERNHARD, and
ISAAC PACHT,
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HENRY ATTIAS,

Attorneys for Plaintiffs-Appellants.

APPENDIX.

One of the disputed issues of fact is the burden of the employment duties of Appellants. In Appellants' Affidavit in Support of Motion for Partial Summary Judgment, it is stated [R. 117]:

"Because the plaintiffs were required on the premises of defendant for 24 hours each work day as a condition of employment, and were not free to go and come as they pleased after their regular 8 hours work, but were required to hold themselves in instant readiness to serve defendant, the normal living of the plaintiffs was interrupted. The requirement that plaintiffs listen for the telephone signals and alarms at night, affected their night time sleeping hours and their normal living.

If a qualified relief man was not available to relieve plaintiffs on their days off, they would have to remain on the premises 24 hours each day until relief was obtained. Sometimes this resulted in the plaintiffs not having sufficient food available for a period of time and endangered the health of the plaintiffs and their families.

In case of illness, since the plaintiffs could not leave the premises, they were dependent upon physicians of the defendant who came to the premises in emergency.

Since some of the stations were located far from settled communities, the plaintiffs would have to do their shopping in larger communities on their days off, thus taking up a considerable part of their off duty time, on days when they were relieved.

The purpose of the defendant's rule requiring the plaintiffs to remain on the premises 24 hours each

day, was for the sole benefit, convenience and necessity of the defendant. This is evident by the fact that if the plaintiffs were not available throughout the 24 hours, destruction of the defendant's property would follow. Thus for example: A routine check of an ammeter will prevent the overloading of a power line. By transferring part of the power load to another line, damage is prevented to the line itself and loss of power to the customer. A regular check on the transformer bank may show the temperature dangerously high. By checking, the operator may discover that the circulating pump is off. Failure to correct this may cause damage to defendant's equipment. Routine checks of the meters might show them behaving erratically, and by thus checking the switches the station attendant may discover that the switch contacts within the switch bank were arcing. Failure to discover this might mean that oil would become hot and explode and set fire to the switch, dropping the load on the bank and thus putting a lot of consumers out of service.

If the plaintiffs were not available to check the various instruments, transformers could be overheated and destroyed, causing loss in excess of \$50,000, cost of some of the transformers. A loss of service resulting from the failure of any of the plaintiffs to perform their required duties would result in large property losses to the defendant.

The plaintiffs' presence on the defendant's property 24 hours each work day is of vital importance to all industries in the area because even the failure to turn on street lighting would disrupt commerce."

With respect to the disputed question of the contract of employment, said affidavit sets forth the following [R. 118]:

“Prior to the Fair Labor Standards Act of 1938 the plaintiffs received only their salary for all of the aforesaid duties. By order issued by the defendant, after the F. L. S. A. went into effect, and throughout the period covered by this action, it was agreed that the plaintiffs would perform all of their aforesaid duties and would be paid a stipulated monthly salary, and that in addition, plaintiffs would receive time and a half their hourly rate based upon a forty hour week for all hours worked in excess of 40 in any work week. The plaintiffs did, after December 24, 1943, receive overtime pay at one and one-half times their hourly rate for work denominated by the defendants in their answer as ‘extraordinary or emergency active duty.’ ”

In answer to certain of Appellee’s Interrogatories, certain of the Appellants stated [R. 314]:

“Answer to Interrogatory 80: *The plaintiffs understood that they were getting a salary for the work performed for the defendant, that the salary was based on forty hours of work each week and that they were to receive time and a half their regular hourly rate for all hours worked in excess of forty hours in each work week.* There was no reference at any time or at any place to active or inactive duties. There was never any distinction made by defendant between active or inactive duties. The defendant required the plaintiffs to perform their labors twenty-four hours a day.

Answer to Interrogatory 84: The activity in which the plaintiffs were engaged to wait to answer

emergencies was compensable by custom and practice. Defendant contends that the active duties of the plaintiff consumed not more than two or three hours a day; yet plaintiffs were paid for eight hours. Obviously, it was not for eight hours active duty for which plaintiffs were paid according to defendant, nor was it for any definite number of hours 'actual' work. Plaintiffs were being paid for all services regardless of the time of day when they were performed. This shows a custom and practice of paying for the activity in which plaintiffs were engaged during the time spent in waiting for calls and emergencies."

In the Affidavit of Plaintiffs-Substation Operators, it is stated [R. 303]:

"The undersigned plaintiffs being first duly sworn, depose and say: that *the only agreement entered into by the substation employees and the defendant, Southern California Edison Company, was that said employees would be hired on a salary basis, were required to remain on the premises twenty-four hours per day, and were to receive time and a half for all hours worked in excess of forty hours in each work week.*

In the hiring of substation help it was customary that prospective operators learned about the job and asked for employment on such job, usually going first to the division superintendent, who interviewed all operators first and then sent them to the main office. At the main office, nothing was said to substation operator that the work required only a few hours per day, or two or three hours per day. What was stated was that the physical activities required eight hours per day and that each employee was required to remain on the premises for the balance of the six-

teen hours each day. This is confirmed by the fact that the defendant company required substation employees to place on their time record only eight hours per day. Furthermore, the log entries show at least eight hours per day and frequently more.

In answer to the affidavit of J. D. Garrison, affiants state Mr. Garrison did not say that the active duties required two or three hours per day. On the contrary, Garrison informed substation employees that twenty-four hours each day was required of them.

With respect to the affidavit of Short, he did not at any time say that the substation employees could do as they pleased either after or during their regular work. No official of the defendant company at any time said that substation employees could do as they pleased. After eight hours the substation operators considered themselves free from routine duties but understood that they were still, for the balance of the 24-hour work day, in the employ of the defendant company.

When employed the substation employees were informed that the job required twenty-four hours each day. Nothing was said by any officer, agent, or representative of the defendant that the job was the equivalent of eight hours of duty or less. There were eight day hours each day when the employees were required to take readings and stay at the substation proper on company duty. Only after such eight hours could they go to their home on the premises. They were not free to do as they pleased during any part of said eight hours, or during the entire 24-hour period of each work day.

With respect to the failure of the plaintiffs to place on their time records the remaining sixteen hours each day as overtime, affiants state that the de-

fendant's officers and agents informed employees not to put down such time on the time record.

Affiants state that each work day they performed more than eight hours services for which they did not get paid. Plaintiffs were paid a monthly salary and were required to be on the premises twenty-four hours a day. They were instructed to put down only eight hours per day on their time cards. Overtime for special emergency work was paid after eight hours per day. During the entire twenty-four hour period of each work day, plaintiffs who were employed in the substations were subject to emergency calls and were required to wait for such emergency calls and to perform the other duties required of them by defendants."

In answer to Interrogatory No. 13 [R. 261]:

"Have the plaintiffs Paul W. Cockrell, J. D. Borden, A. L. Honnell and Clarence C. Prinslow, or any of them, ever been paid anything whatever for being required, during certain days of the week, in case they did not go home after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency;"

Appellants answered as follows [R. 320]:

"13. Yes. The employment agreement between the defendant and the Primary Servicemen provided that they would receive a monthly or weekly salary plus time and a half for all hours in excess of forty hours in each work week for all activities, including emergency and standby activity. See answer to 3."

The evidence given in depositions of the Appellants manifest the existence of disputes with respect to material facts. In the deposition of Vernon B. Wert, it is stated:

“Q. On what basis were you paid when you first began to work? A. I was given a monthly salary, my house and my electric energy.

Q. What were your instructions with reference to your hours of work? A. I can't remember that; however, the station that I first went to as a substation operator was a one-man substation, and we were not to leave the property. It was our duty to do whatever was required of us, and that the statement by Mr. Dyer remains in my memory as having been 'The hours of employment are what the job requires.'

Q. And you were required to stay there 24 hours a day, except on your days off. Is that correct? A. That is right.

Q. Has that been the continuous practice ever since that time? A. Yes. [Deposition, p. 4, lines 7 to 24.]

Q. Is it a fact that you have received certain overtime after 40 hours in the work week? A. We have.

Q. Up to the time that the Manpower Commission changed the work week to 48 hours. Is that correct? A. That is right.

Q. Despite that change, your regular work week has been 40 hours a week? A. It's 40 hours a week.

Q. It is 40 hours a week? A. Yes.

Q. The only difference is that you get an extra eight hours of overtime? A. That is right.

Q. Now, you stated that you did get some overtime, for instance, in answering those telephone calls that you mentioned? A. That is right.

Q. How was that overtime based? On what method of computation? A. It was one and one-half times the average annual rate.

Q. Wasn't it the average hourly rate? A. The average annual hourly rate. I beg your pardon.

Q. In receiving your pay, then, you considered that you were receiving pay for eight hours a day? A. That is right.

Q. Nevertheless, after you worked your eight hours a day, you did remain on duty. Is that correct? A. I remained on call, on the job.

Q. On the job? A. Yes." [Deposition, p. 37, line 22, through p. 39, line 1.]

In the deposition of Eugene L. Ellingford, it is stated:

"Q. Which one of those men told you about the work of being a substation operator? A. Mr. Garrison, Mr. L. L. Dyer, Mr. W. L. Dyer and Mr. H. L. Steck.

Q. They all told you the same story? A. That is correct.

Q. What did they tell you about the job, the nature of the job? A. They told me that I would be subject to anything that might be required; that I would be required to put in 24 hours a day; and that not to become discouraged because it was their policy to move the men up as they got the opportunity." [Deposition, p. 3, line 23, through p. 4, line 9.]

In the deposition of M. E. Roach, it is stated:

"Q. What were your hours supposed to be? A. 7:30 to 4:30 with an hour for lunch.

Q. What do you base your claims for overtime on? A. I don't understand the question.

Q. Well, you are suing for a claim of overtime which you haven't been paid for. On what do you base that claim? A. I call it standby time.

Q. Well, tell me on what you base that? A. I was there on the property. I had to live on the property. I couldn't go and come as I pleased.

Q. Did you have any work keeping up the yard? A. Very little. There was a utility man there that done most of it.

Q. So, as I understand it, your regular hours of work were 7:30 in the morning to 4:30 in the afternoon, with an hour off at lunch? A. That is right.

Q. You have given us your estimate, which I won't repeat; and instructions were when you finished up you were to go into this machine shop and assist the man there? A. That is right.

Q. Now, why didn't you leave the property at the end of your day at 4:30? A. I was told when I went there it was a 24-hour job, and I was to stay there.

Q. Who told you that? A. I was told by A. J. Robertson, deceased.

Q. What position did he have? A. He was superintendent of hydro generation in the San Joaquin Division." [Deposition, p. 8, line 14, through p. 9, line 17.]

In the deposition of H. L. Anderson, it is stated:

"Q. When you were hired by Mr. Short as an apprentice, what did he tell you about the job? A. He told me that the job would necessitate my staying on the property 24 hours a day; in relieving men in one-man substations it would be necessary to drive to a substation and arrive there at 8:00 o'clock in the morning, and remain there until 8:00 o'clock on the

morning that my relief was finished; that the job would ultimately lead into one-man substation operator, or station attendant, as they were called; that I would live on the property, then, and have a cottage on the property, and be required to stay on the premises 24 hours a day until my scheduled day off, when the relief man would come in and relieve me and take over for that 24-hour period.

Q. Did he tell you anything about the duties on the job as a substation attendant? A. Yes. He told me that the duties entailed keeping up the grounds and equipment, trip testing, routine switching operation, and emergency switching operations.

Q. Did he tell you anything else about the job that you can recall? A. That is about all.

Q. Was there anything said about salary? A. Yes.

Q. For substation attendant? A. Yes.

Q. What was said about that? A. *He said that the starting salary would be \$120.00 per month.*

Q. *What was that to cover?* A. *Well, that was my wages for the job.*

Q. *The whole job?* A. *Uh huh."* [Deposition, p. 3, line 18, through p. 4, line 24.]

Nos. 12070-12071

**In the United States Court of Appeals
for the Ninth Circuit**

MYRON L. GLENN, ET AL., PLAINTIFFS-APPELLANTS

v.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., A CORPORATION,
DEFENDANT-APPELLEE

RAYMOND F. DRAKE, ET AL., PLAINTIFFS-APPELLANTS

v.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., A CORPORATION,
DEFENDANT-APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE

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In the United States Court of Appeals for the Ninth Circuit

No. 12070

MYRON L. GLENN ET AL., PLAINTIFFS-APPELLANTS

v.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., A CORPORATION,
DEFENDANT-APPELLEE

No. 12071

RAYMOND F. DRAKE ET AL., PLAINTIFFS-APPELLANTS

v.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., A CORPORATION,
DEFENDANT-APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

**BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE**

These are appeals from final judgments (G. R. 331-333, D. R. 103-105) ¹ of the District Court of the United States for the Southern District of California, Central Division, dismissing the actions for lack of jurisdiction of the subject matter by reason of Section 2 of the Portal-to-Portal Act of 1947 (c. 52, 61 Stat. 84, 29 U. S. C. Sec. 251 et seq.), hereinafter referred to as

¹ The record in the *Glenn* case will be referred to by the initials G. R., that in the *Drake* case by the initials D. R.

the "Portal Act." The actions were brought by appellants under Section 16 (b) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 201 et seq.), hereinafter referred to as "the Act," to recover unpaid overtime compensation, an additional equal amount as liquidated damages, and attorneys' fees. The cases were consolidated for trial below by court order (D. R. 14) and on appeal by stipulation (G. R. 336) by reason of the substantial similarity of both the factual and legal issues involved. The actions were summarily dismissed on jurisdictional grounds, without a trial on the merits. Because they present significant questions of interpretation and procedure which are of importance in the administration and enforcement of the Act, the Administrator of the Wage and Hour Division, United States Department of Labor, with leave of Court, submits this brief as *amicus curiae*.

JURISDICTION

The district court had jurisdiction of these cases under Section 16 (b) of the Act, and also under what is now Title 28, United States Code, Section 1331. The effect upon that jurisdiction of Section 2 of the Portal Act² is the principal legal issue in these appeals. The jurisdiction of this Court over the appeals arises under Title 28, United States Code, Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

While the facts, particularly those of an evidentiary character, are discussed at length in the briefs of both appellants and appellee, and require no further repetition here, it is believed that a somewhat different presentation of the course which the actions have taken to date may be of assistance in better understanding the procedural and jurisdictional questions with which this brief will be concerned.

These actions were started prior to the passage of the Portal Act, and relate solely to the recovery of overtime compensation claimed to be due for work performed prior to May 14, 1947.

² Section 2 of the Portal Act is set forth in full in the Appendix, *infra*, pp. 14-15.

In order to meet the specific jurisdictional requirements for such actions, which Section 2 of the Portal Act provides, it became necessary to file amended complaints. The most recent of the amended complaints in both cases (G. R. 103-111, D. R. 37-42), in the light of appellee's answers (G. R. 131-172, D. R. 46-75), raise disputed questions as to coverage under the Act, the number of hours which may properly be regarded as hours worked under it, whether appellants worked any overtime for which appellee failed to pay in accordance with the Act's requirements, the compensability under an express provision of a written or nonwritten contract, or a custom or practice, of appellants' activities during overtime hours, the existence of good faith defenses under Sections 9 and 11 of the Portal Act, and the constitutionality of the Portal Act.

Numerous answers to interrogatories, responses to requests for admissions, exhibits, depositions, affidavits, and stipulations have been filed by both sides. There has also been some oral testimony during pretrial proceedings (D. R. 116-176). A stipulation (G. R. 75-84) filed pursuant to the order for pretrial hearing sets forth the contentions of both sides on the various issues involved and indicates disputes as to both legal and factual issues. Appellants moved for a partial summary judgment (G. R. 112) which would leave only the amount of damages to be determined by a Special Master. The affidavits filed in support of (G. R. 113-123) and in opposition to (G. R. 173-216) this motion show sharply conflicting versions as to the contract of employment, the understanding of the parties as to what appellants' salaries covered, the hours devoted by appellants to the different types of activities in which they engaged, whether appellee paid the required overtime, and appellee's good-faith defenses. Appellee also filed a motion for summary judgment (G. R. 219-220) based upon the entire record in the proceedings, and again there were both supporting (G. R. 222-256) and opposing (G. R. 298-311) affidavits offering the same sharply conflicting positions.

An order was entered on both motions for summary judgment (G. R. 329-331) in which it was recited that there was no genuine issue as to "any material fact involved in determining the right to recovery," that the activities in question were not

made compensable "by any contract or custom or practice" during the portion of the day they were engaged in, that if those noncompensable activities were excluded in computing overtime, the requirements of the Act were fully met, that since these actions sought to enforce liability for such noncompensable activities, jurisdiction of the subject matter was withdrawn by Section 2 of the Portal Act, and that defendant was entitled to a judgment dismissing the actions for such lack of jurisdiction. It was accordingly ordered that appellants' motion for summary judgment be denied, that appellee's be granted, and that a judgment be submitted dismissing the actions for lack of jurisdiction of the subject matter (G. R. 331-333, D. R. 103-105).

QUESTIONS PRESENTED

This brief is addressed to the following questions only:

1. Whether the court below erred in dismissing these actions by summary judgment without a trial on the ground that the activities for which recovery was sought were not "compensable" within the jurisdictional requirements of Section 2 of the Portal Act.
2. Whether the summary dismissal of these actions can be sustained on any of the other grounds urged by appellee.

SUMMARY OF ARGUMENT

1. The summary dismissal on jurisdictional grounds was error in view of the well-established rule that actions should not be dismissed prior to trial if, on any possible view of the pleadings and supporting documents, a plaintiff can establish his case, or if any material fact is in dispute. Appellants' complaints and affidavits expressly allege that the activities in question are "compensable" by contract and make a sufficient showing of compensability to satisfy the jurisdictional requirements of Section 2 of the Portal Act. While appellee's affidavits deny that the activities are compensable, the record before the district court actually shows that even on the basis of appellee's presentation of the facts, the activities in question were compensable to some extent and therefore sufficient to meet the jurisdictional requirements of the Portal Act. The

present state of the record on the issue of compensability is at the very least sufficiently doubtful to preclude summary dismissal and to require full development of the factual evidence.

2. The summary dismissal cannot be sustained on any other grounds advanced by appellee in view of the numerous varied and complex factual and legal issues and because of the sharp conflict in the factual evidence as set forth in the opposing affidavits. The burden is on appellee to establish that no conflict exists as to material facts, and it has not sustained that burden.

ARGUMENT

I

The summary dismissal on jurisdictional grounds was error

Under this Court's decisions in *Tipton v. Bearl Sprott Co.*, 175 F. (2d) 432 (C. A. 9) and *Joshua Hendy Corporation v. Mills*, 169 F. (2d) 898 (C. A. 9), it is clear that the allegations of the complaints sufficiently meet the jurisdictional requirements of Section 2 of the Portal Act. The question presented by this appeal is whether there was a sufficient showing apart from the pleadings (i. e., in the affidavits and stipulations) to warrant the conclusion, without a full trial of the factual issues, that the activities in issue were not "compensable" and that therefore the court was without jurisdiction. We submit that the affidavits and pleadings require quite the contrary conclusion and demonstrate at least the necessity of a full trial before final determination of the jurisdictional issue in these cases.

Appellants' complaints and affidavits allege an express agreement to pay overtime compensation for "hours worked" in excess of 40 in a workweek. Paragraph IV of Count I of each of the amended complaints alleges:

That plaintiffs at all times mentioned in this action were employed by defendant under an express provision of an oral and written agreement in effect during all of the time of their employment; that pursuant to said agreement, plaintiffs were employed at a stipulated monthly salary based on 40 hours of work each week

and were to receive in addition thereto additional compensation at one and one-half times their regular hourly rate for all hours worked in excess of forty hours in each workweek. That plaintiffs worked in excess of forty hours in each workweek during the period covered by this action, but did not receive the compensation required by the Acts, *although all of said work time and overtime was compensable under said agreement and said Acts.* [Emphasis supplied; D. R. 39, G. R. 107–108.]

In addition, an affidavit signed by eleven of the plaintiffs states:

* * * throughout the period covered by this action, it was agreed that the plaintiffs would perform all of their aforesaid duties and would be paid a stipulated monthly salary, and that in addition, plaintiffs would receive time and a half their hourly rate bases (sic) upon a forty-hour week for all hours worked in excess of 40 in any workweek. [G. R. 119.]

It is clear from the preceding portions of the affidavit, which describe all of plaintiffs' duties in detail, that the term "aforesaid duties" includes the activities for which compensation is sought. (G. R. 113–118.)

There are, therefore, in the instant cases the necessary allegations that the activities were compensable. Cf. *Tipton v. Bearl Sprott Co.*, 175 F. (2d) 432 at 436. It follows that if the allegations set out in the verified complaints and in the affidavits are accepted as true, the jurisdictional requirements of Section 2 of the Portal Act have clearly been satisfied. This Court's remarks in a comparable situation are equally applicable here: "If and when this case goes to trial, appellants will, of course, have the burden of proving [their allegations] * * *. They may sustain this burden. They may fail to sustain it, *but we cannot assume that they will fail.*" [Emphasis supplied; *Tipton v. Bearl Sprott Co.*, 175 F. (2d) 432 at 435.]

That the allegations in appellants' pleadings and affidavits do provide a sufficient basis for proof of the right to recover is clearly indicated by this Court's decision in *Joshua Hendy*

Corporation v. Mills, supra. In that case, as appears to be the situation in the instant cases, the contract did not mention which types of activity would be compensable, but simply provided that overtime compensation would be paid for "work performed" in excess of 40 hours per week. This Court held that this provision sufficed to render the Portal Act inoperative to services rendered by an engineer during his lunch period, saying:

It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the workweek at 40 hours straight time and 8 hours overtime and further provides for the payment of overtime for all "work performed" in excess of 40 hours per week. Mills performed 11 hours work in excess of 40 hours within the meaning of the phrase "work performed." He was paid for 8 hours overtime only.

The *Hendy* case was followed by the Court of Appeals for the Seventh Circuit in *Frank v. Wilson & Co., Inc.*, 172 F. (2d) 712, certiorari denied 337 U. S. 918, which also involved a quite similar situation. In the *Wilson* case, as in the *Hendy* case, and in these cases, the dispute arose out of the employer's failure to compensate the employees for time spent in certain activities engaged in outside any scheduled hours. As in the instant cases, and in the *Hendy* case, the contract did not mention which types of activity would be compensable. In the *Wilson* case, it merely provided overtime compensation for employees who "are required to work" in excess of the stipulated number of hours. Relying on, and quoting the above paragraph of, this Court's opinion in the *Hendy* case, the Seventh Circuit held that the jurisdictional requirements of Section 2 of the Portal Act had been met.

While the answers in the instant cases deny the above-quoted paragraphs from plaintiffs' complaints (D. R. 49, G. R. 137) and appellee filed affidavits in support of their denial (G. R. 197, 201), the net effect of the opposing affidavits is to indicate that the activities in issue are "compensable" even on the basis of the allegations and contentions of appellee—quite contrary

to the conclusion reached by the court below. Appellee's answers allege that appellants received a monthly salary as "the full and only compensation for all services," except emergency work at night which was paid for at a premium. Similarly, in the pretrial stipulation (G. R. 80) appellee claimed that "the monthly salary paid to plaintiffs covered all services performed, active or inactive, whether denominated waiting or stand-by time, or otherwise, except emergency call-outs during nighttime hours for which overtime was paid." Appellee has consistently maintained this position (G. R. 378). The answers and the pretrial stipulation also state that normal active services required only about two to five hours a day (G. R. 80, 140).

The fact that such a monthly salary was paid for all services, whether active or inactive, does not, of course, establish the type of activities which are ultimately to be counted as hours worked, nor does it establish how many hours were spent in a particular activity in a given week. Those remain disputed legal and factual questions which, for the reasons indicated *infra*, can best be determined by a full trial on the merits. It does, however, clearly establish, as far as the record which was before the district court is concerned, that appellants in fact received a monthly salary which was paid as compensation for any and all services, including the activities in issue here. **The answers** and pretrial stipulation show that some part of the salary was paid for inactive services. There can be little doubt that a flat salary for a week or a month constitutes compensation at straight time for all services during the period for which it is paid. *Overnight Motor Co. v. Missel*, 316 U. S. 572. Whether it is paid by reason of contract, or by custom or practice, is not particularly important. If it is paid by custom or practice, it clearly constitutes compensation at straight time for all of the services which it covers. If it is paid by contract, it satisfies the requirement in Section 2 of the Portal Act for an express provision of a contract as long as it is paid for the activities in question. *Joshua Hendy Corporation v. Mills*, 169 F. (2d) 898 (C. A. 9); *Johnson v. Dierks Lumber & Coal Co.*, 130 F. (2d) 115 (C. A. 8); *Frank v. Wilson & Co., Inc.*, 172 F. (2d)

712 (C. A. 7), certiorari denied 337 U. S. 918; *Lewellen v. Hardy-Burlingham Min. Co.*, 73 F. Supp. 63 (E. D. Ky).

The fact that the salary is intended to compensate only at straight-time rates, even if the services are performed during overtime hours, is of no significance as far as the jurisdictional requirements of Section 2 of the Portal Act are concerned. Section 2 of the Portal Act requires only that the activities be "compensable"—it contains no requirement concerning the rate at which they must be compensable. Thus, in *Michigan Window Cleaning Co. v. Martino*, 173 F. (2d) 466 (C. A. 6), the requirements of Section 2 of the Portal Act were held to be satisfied where an express contract made the activities compensable "and this, without regard to whether compensability was based on straight time or overtime." Similarly, in *Green v. Cherokee Motor Coach Co.*, 8 W. H. Cases 277, 280 (E. D. Tenn., not officially reported) the court said concerning Section 2, "It is not a question of whether there was a contract or custom to pay overtime. The question is whether there was a contract or custom to pay the employee for activities performed." This view was made clear by the President in his message to the Congress approving the Portal Act (93 Cong. Rec. 5281). He stated that Section 2 referred to "activities which were compensable in any amount." The Administrator has also consistently adhered to the position that it is sufficient in this connection that the activities be "compensable in any amount."³

Thus, the record in its present state, even on the facts as presented by appellee, appears to support the conclusion that the activities in issue are "compensable" within the requirements of Section 2 of the Portal Act. The most that can be said of appellee's pleadings and affidavits is that they create a sharp conflict over the most material jurisdictional facts. It is too well settled to need extended discussion of authority that where there is such conflict over material facts, it is clearly error to grant a motion for summary judgment.

Particularly is summary dismissal error where, as here, the disputed factual issues are not "clear cut and simple," but are

³ General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938. Title 29, Chapter V, Code of Federal Regulations, Part 790, Section 790.9 (b). 12 F. R. 7655, 7660.

complicated mixed questions of law and fact. These are precisely the sort of cases to which the language in *Kennedy v. Silas Mason Co.*, 334 U. S. 249, quoted at pages 15 and 16 of appellants' brief, is peculiarly appropriate. The mass of answers to interrogatories, opposing affidavits, and partial testimony presents a particularly "treacherous record" (334 U. S. at 257) for decision by the use of summary procedures. The Supreme Court in the *Silas Mason* case emphasized the fact that there was a substantial controversy as to how the parties construed their contracts in actual practice "both sides of the controversy being based on events of which we are asked to take judicial notice or to spell out from contracts without the tests which trial affords"—a situation which also exists with respect to the jurisdictional issue in the instant cases.

This Court in several decisions has taken occasion to point out the right of the parties to a full trial where material factual allegations are denied. In *Aaron Ferer & Sons v. Richfield Oil Corporation*, 150 F. (2d) 12 (C. A. 9), where the facts were presented by affidavits and counter affidavits, just as was done to a great extent in the instant cases, this Court held that a motion for summary judgment was properly denied, saying (at page 13): "This created a 'genuine issue as to a material fact' and hence required the usual trial by witnesses, subject to cross-examination * * *." See also *Lane Bryant, Inc., v. Maternity Lane*, 173 F. (2d) 559 (C. A. 9).

Other appellate courts have consistently taken the same view, emphasizing the "great care" that should be taken in granting summary judgment where there is doubt as to the facts. Thus, in *Doehler Metal Furniture Co. v. United States*, 149 F. (2d) 130 (C. A. 2), the court said at page 135:

We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts * * *. Denial of a trial on disputed facts is worse than delay. * * *. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered.

Similarly, in *Walling v. Reid*, 139 F. (2d) 323 (C. A. 8), in an action under the Fair Labor Standards Act, the court pointed out that mixed questions of law and fact should not be decided on "anything less than a full and careful inquiry into all the facts and circumstances," and pointed out the need for cross-examination of witnesses to bring out the true facts. See also *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620, 627. The special need for a full trial of the complex issues presented in Fair Labor Standards Act cases has been noted not only by the Supreme Court (see *Silas Mason* case, *supra*), but has been repeatedly emphasized in decisions of the Court of Appeals for the Eighth Circuit in reversing judgments reached on summary procedure. See in addition to *Walling v. Reid*, *supra*, *Walling v. Fairmont Creamery Co.*, 139 F. (2d) 318, 323; *Musteen v. Johnson*, 133 F. (2d) 106, 108; *Stratton v. Farmers Produce Co.*, 134 F. (2d) 825, 827; and *McComb v. Johnson*, 174 F. (2d) 833.

There is an additional reason which makes summary dismissal of the jurisdictional question particularly inappropriate here. It is evident that the question of whether or not activities are compensable by contract, custom, or practice, so as to give the courts jurisdiction within the meaning of Section 2 of the Portal Act is inextricably interwoven with the many factual questions involved in determining what the contract, practice, or custom actually is, such as the understanding of the parties, the hours actually spent in the various activities, and whether or not those activities may, in whole or in part, be considered hours worked under all the existing circumstances. These are the very points on which the affidavits and counter affidavits are in sharpest conflict. It seems especially appropriate under such circumstances to let determination of the jurisdictional question await a full trial on the merits, since it is only by establishing a right to recover on the merits that the jurisdictional issue itself can be determined. See the quotation at page 16 of appellants' brief from *Twigg v. Yale & Towne Mfg. Co.*, 7 F. R. D. 488 (S. D. N. Y.), which fully supports this position. So, too, in *Land v. Dollar*, 330 U. S. 731, the Court said at page 735: "* * * this is the type of case

where the question of jurisdiction is dependent on decision of the merits."

II

The summary judgment of dismissal cannot be sustained on any of the other grounds advanced by appellees

The other issues briefed by the parties (namely, whether the activities for which recovery is sought constitute worktime under the Fair Labor Standards Act, and whether appellee has a complete defense under Section 9 or a partial defense under Section 11 of the Portal Act), were not resolved by the court below. Nor, we submit, can the summary judgment be supported by attempting to resolve them on this appeal. In view of the conflicting factual representations on these issues and in view of their complex character and importance, the decisions and principles discussed above under Point I apply with equal force to preclude their determination by summary procedures.

Even a most cursory examination of the affidavits, counter affidavits, and other documents in the record in the instant cases will disclose sharp conflicts on the facts material to the determination of these issues, such as the understanding of appellants as to employment contracts, the type of activity included in hours worked, and the time spent in such activities. These issues are anything but "clear and simple," and the mass of conflicting pleadings and affidavits obviously does not lend itself to summary disposition, particularly not on appeal. See discussion of *Silas Mason* case, *supra*. Appellants point out in detail many of the factual conflicts, at pages 13-14 of their brief. Appellee certainly has not sustained its burden of showing the contrary to be true.

It is clear that on a motion for summary judgment the burden is on the moving party to show that there is no disputed issue of fact. Thus, in *Walling v. Fairmont Creamery Co.*, 139 F. (2d) 318 (C. A. 8), the court said at page 322: "On a motion for summary judgment the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, all doubts are resolved against him * * *." The court also stated that on appeal the court "must give the plaintiff the

benefit of every doubt." To the same effect see *Wittlin v. Giacalone*, 154 F. (2d) 20 (App. D. C.); *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F. (2d) 1016 (C. A. 8).

CONCLUSION

The summary judgments of the district court dismissing the complaints for lack of jurisdiction should be reversed and the cases remanded to the district court for trial.

Respectfully submitted.

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SEPTEMBER 1949.

APPENDIX

Section 2 of the Portal Act reads:

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there

shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, or any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

Nos. 12070-1
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 12070.

MYRON L. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,
Defendant-Appellee.

No. 12071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,
Defendant-Appellee.

Appellee's Reply to Amicus Curiae Brief of the Administrator of the Wage and Hour Division of the Department of Labor.

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Nos. 12070-1

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12070

MYRON L. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

No. 12071

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

Appellee's Reply to Amicus Curiae Brief of the Administrator of the Wage and Hour Division of the Department of Labor.

Statement.

The instant appeals deal solely with the effect of the Portal Act upon the right of the appellants to recover for

standby time occurring during a period long prior to the effective date of that Act, such standby time having also been eliminated prior to the Act.

The Administrator does not reply to our contention that the appellee's affirmative defenses were established as a matter of law (our brief, pp. 58-70) except by stating, without advancing any reason therefor, that those defenses required a trial on the merits. It is understandable that the Administrator might have an interest in the decision of this Court on the questions presented by those defenses, especially as two of them dealt with the acts of the Administrator. It is therefore significant that he does not attempt any answer to our contentions, (1) that his Administrative Bulletin 13, even after its revision following the *Skidmore* and *Armour* cases, justified the conclusion that in the factual situation of the instant cases appellants' standby time was non-compensable even before the Portal Act (our brief, pp. 62-3); (2) the appellee was clearly entitled to rely upon the actions of the Administrator's deputy for Southern California (our brief, pp. 64-5); (3) the obvious right of the defendant to rely upon the actions of the War Labor Board.

As we analyze the Administrator's brief, his position that the Court erred in dismissing for want of jurisdiction rests upon two contentions:

(1) That the averments of the complaint and the appellants' affidavit showed that the appellants' standby time was made compensable by contract;

(2) That the defendant's answer also showed it to be so compensable.

The Appendix attached hereto contains an analysis of all cases cited by the Administrator and a number of additional authorities relied on by us, the majority of them decided after the filing of our brief.

We shall use the same designations as in our brief on file, referring to that brief by the letters "O. B.," meaning "our brief," to the *amicus curiae* brief by the letters "A. C. B.," and to the Appendix attached to this brief as "Ap.-2," the Appendix to our brief already on file being referred to as "Ap."

All emphasis in this brief and in Ap.-2 will be ours unless otherwise noted.

I.

The Record Shows Without Conflict That There Was No Contract, Custom or Practice to Pay for the Standby or Waiting Time of Appellants.

At the outset, it is to be noted that the *amicus curiae*, as well as the appellants, discuss only the appeals of what we have denominated the "resident employees." No attempt is made to discuss the validity of the judgment of dismissal as to the primary service men, or to answer the portions of our brief (pp. 14-19) in which we show that in no event did the Court have jurisdiction as to them. Hence we shall confine our discussion to the appeal of the resident employees.

As we read the *amicus curiae* brief, it is contended that, for the purpose of jurisdiction, the record contained sufficient showing that the standby time was compensable because so alleged in the complaint and in the affidavit filed in support of appellants' motion for partial summary judgment.

The allegation in the complaint, which is quoted on page 5, A. C. B., is a mere conclusion that the plaintiffs were employed for forty hours a week and "in addition thereto were to receive additional compensation at one and one-half times their regular hourly rate for all hours worked in excess of forty hours in each work week."

The Administrator cites *Tipton v. Bearl Sprott Co.* (C. C. A. 9), 175 F. 2d 432, and *Joshua Hendy Corporation v. Mills* (C. C. A. 9), 169 F. 2d 898, to the effect that the allegation was sufficient to show jurisdiction. The cases are analyzed in Ap.-2, pages 1 to 6, where it is shown that neither sustains the contention.

As pointed out in O. B., page 12, so far as we are advised, every court that has considered such an allegation has held it is not sufficient to meet the requirements of Section 2 of the Portal Act. This, for the reason that a written contract which promises to pay overtime for work in excess of forty hours a week without specifying the particular activity for which overtime is to be paid does not meet the requirements of the Act, that *there must be an express provision of a contract* or a custom or practice to pay for the particular activity for which recovery is sought. See cases collated pages 129 to 137 of the Appendix and additional cases Ap.-2, pages 8 to 15. The Portal Act prohibits the recovery for any activity unless it is made compensable, not by a contract, but by "*an express provision of a written or nonwritten contract. . . .*"

As stated by the District Court in *Green v. Cherokee Motor Coach Co.* (not officially reported), 8 WH Cases 277, 280, cited by the Administrator:

"It is not a question of whether there was a contract or custom to pay overtime. The question is whether there was a contract or custom to compensate the employee for activities performed."

Directly in point is the recent decision of the Sixth Circuit in *Newsom v. E. I. Du Pont De Nemours & Co.* 173 F. 2d 856 (digested and quoted from extensively in Ap.-2, p. 8), wherein the Court, in holding that a contract containing the precise averments as in the instant

case was insufficient to sustain recovery for preliminary and postliminary activities, said in part:

“In order that activities be expressly compensable under this provision they must be specifically described. *A contract which does not refer to and specify the activities for which compensation is to be made does not bring the exception into force.*”

But even if the allegation of the complaint could be held technically sufficient, it could not defeat a motion where the record clearly and without contradiction shows there was no contract to pay for such activities. As stated by the Supreme Court:

“The trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, ‘*inquire into the facts as they really exist.*’”

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 184.

Amicus curiae quotes the affidavit of appellants wherein, after detailing their duties, it is stated that prior to the original Act they were paid only straight time, and that after the Act an order issued by the defendant went into effect wherein it was agreed they would perform their services at a stipulated monthly salary and receive overtime for all hours in excess of forty per week. It is urged that the affidavit precluded the Court from deciding it was without jurisdiction of the action and requires it to give the immense amount of time and put the parties to the enormous expense that would have been involved in a trial on the merits.

There are three separate conclusive reasons why the affidavit cannot be given that effect:

First, the affidavit is insufficient under Rule 56(e), which requires the contract to be attached or set out in the affidavit.

As observed by the Eighth Circuit Court of Appeals:

“When written documents are relied on, they must be exhibited in full. *The statement of the substance of written instruments or of affiant’s interpretation of them or of mere conclusions of law or restatements of allegations of the pleadings are not sufficient.* Rule 56(e), Rules of Civil Procedure; 3 Moore’s Federal Procedure Under the New Rules, p. 3175 *et seq.*”

Walling v. Fairmont Creamery Co. (C. C. A. 8),
139 F. 2d 318, 322.

Second, a statement that employees are to be paid time and a half for services in excess of forty hours does not show that the parties agreed that any particular service was compensable. (See O. B., p. 12; Ap., pp. 129-137, Ap.-2, pp. 8 to 15, and cases there cited.)

Third, the appellants’ answers to the interrogatories expressly stated that the contract on which they relied was Operating Order A-36 [Exs. 1 and 2, R. 171], thereafter referred to in our brief and herein as the “bulletin,” and upon custom and practice.

The effect of this bulletin has been very fully discussed, with record citations, on pages 28 to 34 of O. B. As there pointed out, the bulletin merely promised to pay overtime for work in excess of forty hours without designating what constituted "work" or what activities were compensable. As heretofore pointed out, all the authorities hold that such a contract does not meet the requirements of the Portal Act in that it does not specify what activities constitute work or were to be paid for. (See Ap., pp. 129-137; Ap.-2, pp. 8 to 15.]

The record not only does not show that there was any contract or custom to pay for the standby time, but affirmatively discloses precisely the contrary.

The record shows that while the appellants claim they had a definite eight hour shift, for which they were paid their monthly salary, the defendant claimed they had no specific time within which to perform their services, except that they were supposed to execute them in the daytime between the first call to the switching center in the morning and the last call in the afternoon, the time between such calls, with an hour out for lunch, being eight hours. Regardless of which contention is correct, the record without controversy shows that after the last call to the switching center, which appellants claim was the end of their shift, except for the requirement of remaining within hearing of the alarm bell, they were free to do as they pleased. This, the appellants concede in their affidavit, from which we quote:

"After eight hours the substation operators considered themselves free from routine duties but under-

stood that they were still, for the balance of the 24-hour work day, in the employ of the defendant company." [R. 304.]

It was also uncontroverted that they reported eight hours of work whether they performed that much or not, and only reported as overtime emergency services performed during nighttime hours, and the sixth day when Southern California was on a forty-eight hour week. "Nighttime hours" for the substation men were between 6:00 P. M. and 8:00 A. M., and for the hydro employees between the last call to the switching center in the afternoon and the first call in the morning. Appellants were paid a monthly salary and overtime for emergency services performed during the nighttime hours, the hourly rate to their knowledge being figured on the assumption that their salary was applicable to forty hours of work a week. Appellants neither requested, expected or received any other compensation (O. B., pp. 28-34).

While the Administrator asserts generally that there is much contradiction in the affidavits of the parties, he makes no effort to show that the above facts were controverted, or that any factual dispute between the parties was not on issues wholly immaterial to the question of the Court's jurisdiction.

We submit that the suggestion that the record contained any evidence to support the claim that the standby time was made compensable by an express provision of a contract or by custom or practice is wholly devoid of merit.

II.

The Answer Does Not Show That the Standby Time Was Compensable by Either an Express Provision of a Contract or by Custom or Practice.

The next contention of the Administrator is that the answer shows that appellants' standby time was compensable. The point is one which is not raised by the appellants; in their opening brief the appellants state:

"The defendant, by its answer to the third amended complaint, *denied the material allegations thereof* and asserted the following affirmative defenses: (a) that there was an understanding between the parties that the monthly salary was to be the only compensation for all services rendered by the employees except for so-called 'emergency service.'" (App. Br., p. 6.)

No fair or reasonable interpretation of the answer supports the Administrator's contention.

In Paragraph IV of the complaint it is alleged that the plaintiffs were employed on a monthly salary, *based on forty hours of work each week* [R. 107-8]. Paragraph III of the answer denied that the contract of employment was as alleged. The answer then sets forth in detail the various classes of resident employees and their respective duties, and that their services and the time taken to perform them was much less than eight hours per day, but that their salary was paid to them *on the theory that their services were the equivalent of forty hours of active service*, in addition to which they were paid at least time and a half for emergency services performed during the nighttime hours hereinbefore defined [R. 137-149]; that in computing the hourly rate for such overtime services the salary was computed on the basis of being applicable to

forty hours of work per week [R. 141]. In the second defense to the complaint it was specifically alleged that there was no contract or custom or practice to pay for the said standby time [R. 153-154].

Thus the plaintiffs allege that they were employed and paid a salary for a definite eight hour shift, for which their monthly salary was paid them. The defendant alleges that, while they had no definite time in which to perform their services, they were paid for eight hours of work per day for a five day week; it being undisputed that when they worked the sixth day they were paid time and a half for eight hours, whether they performed that amount of work or not. Thus it is apparent that the controversy between the parties is one of terminology.

If it could be held that there was any difference in substance between the pleadings, clearly the plaintiffs must elect on which alleged contract of employment they seek to recover. If they elect to accept the contract as alleged by the defendant, it is certain they would be out of court, because that contract shows they had not put in forty hours of work. If the case is to be reversed because of any deficiency of the answer, there would be the rather anomalous situation of a reversal *to enable the plaintiffs to disprove their own averments and prove the truth of the averments of the defendant.*

However, as noted, the answer specifically denied that standby time had been made compensable by any express provision of a contract or by custom or practice [R. 154]. If that specific portion of the answer can be ignored—and it cannot—and if the Administrator's contention (not advanced by the appellants) could be sustained, there would be no case in which postliminary and preliminary activities would not be compensable. Where an employer required its employees to be upon the premises for any length of time, either before or after the starting of a shift, either to prepare for work or in cleaning and repair-

ing equipment and putting it in shape afterwards, the hourly, weekly or monthly rate of pay agreed on must of necessity take into consideration and be based not only upon active services rendered, but the time of the employees in such preliminary and postliminary activities. We believe that was one of the motivating theories on which it was held in the series of decisions resulting in the Portal Act that such activities were "work" within the meaning of the original Act. However, the quite conclusive fact (not commented on by the Administrator or, for that matter by the appellants in their reply brief) is that the statute does not permit a recovery upon a showing that the activity was impliedly made compensable by a contract, but only where it is compensable "*by an express provision of a written or nonwritten contract * * **"

As pointed out in our brief, that specific provision was inserted by Congress to bar recovery in cases precisely of the character of the instant case. Congress undoubtedly knew that if it merely provided that the services should be compensable by contract or practice or custom, that the word "contract" would be construed as applying to an implied contract, and in most, if not all, cases postliminary and preliminary activities, on the theory which the Administrator urges, could be held to be compensable by an implied contractual obligation. Hence the requirement that before there can be a recovery for such activities it must be shown they were made compensable not by a contract, but "*by an express provision of a contract.*"

Clearly the defendant's answer cannot by any tortured construction be interpreted as alleging that standby time during the nighttime hours was made compensable by any *express provision* of a contract between the parties, even if the Court could,—as it cannot,—disregard the express averments of the answer that said standby time was not compensable by any provision of the contract or by custom or practice.

As emphatically as possible we would call special attention to O. B., page 27, in which we set forth the portion of the Congressional debates *showing conclusively* that Congress expressly intended to bar recovery in precisely the situation of the instant case, and that the Administrator, and for that matter appellants in their reply brief, have ignored that all conclusive portion of the Congressional Record.

THE CONTENTIONS OF THE ADMINISTRATOR ENTIRELY IGNORE THE PROVISIONS OF SUBSECTION (b) OF SECTION 2 OF THE PORTAL ACT WHICH CLEARLY RENDER THE STANDBY TIME FOR WHICH RECOVERY IS SOUGHT IN THE INSTANT CASES NON-COMPENSABLE.

The Administrator and for that matter the appellants entirely ignore the provisions of subparagraph (b) of Section 2 of the Act, which reads:

“(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice *only when it was engaged in during the portion of the day with respect to which it was so made compensable.*”

There can be no question but that this provision was inserted in the Act for the express purpose of preventing recovery in a situation such as that presented in the instant cases. The only dispute in the record is as to whether during the period between their first and last call to the switching center, which appellants claim to be an eight hour shift, appellants were usually fully occupied in performing their duties or whether, as defendant con-

tends, only a small portion of that time was required for the discharge of their active duties. Recovery is not sought for any standby time during those hours but for the sixteen hours resulting from their being required to live on the premises,—in other words, for the time which they spent in their homes with their families between the last call to the switching center and the first call in the morning. There is not the slightest contention that during that period appellants were required to perform any active duties except in case of an emergency. For such emergency services appellants concede they were paid at least time and a half.

By no stretch of the imagination or tortured method of construction can the answer of the defendant be construed as intimating or suggesting that their standby time during the nighttime hours was compensable by contract, custom or practice.

It is clear, not only from the Congressional Debates set out in the Appendix (pp. 1-14) and in our brief (O. B., p. 27), that the Portal Act was especially designed to bar recovery for such activities and that subsection (b) was inserted for the express purpose of guarding against recovery in a situation such as the instant case.

In the Conference Report on this bill to the House (H. R., 80th Congress, First Session, April 29, 1947) special attention is called to Section 2(b) as follows:

“The conference agreement (section 2(b)) contains a provision not stated expressly in either bill, that an activity shall be considered as compensable under the above referred to contract provision or custom or practice only when it was engaged in during the portion of the day with respect to which it was

so made compensable. Under this provision, for example, if under the contract provision or custom or practice an activity was compensable only when engaged in between 8 and 5 o'clock but was not compensable when engaged in before 8 or after 5 o'clock, *it will not be considered as a compensable activity when engaged in before 8 or after 5 o'clock.* So also, if under the contract provision or custom or practice an activity was compensable when engaged in before 8 but was not compensable when engaged in after 5 o'clock, it will not be compensable under the bill as agreed to in conference *when engaged in after 5 o'clock.*"

We submit that subdivision (b) of Section 2 fits the instant case like a glove and bars recovery for the standby time sought in this case. In this connection, it must be borne in mind that there is no question presented as to standby time during the period between the first and last calls to the switching center which the appellants claim was a definite shift. The suit is concededly for the standby time in remaining upon the premises during the nighttime hours. The recent decision by the District Court of New York in *Galvin v. National Biscuit Company*, 82 Fed. Supp. 535 (digested Ap.-2, p. 10), is directly in point.

It is crystal clear not only from the pleadings but the entire record that neither party prior to the decisions in the *Skidmore* and *Armour* cases imagined that the standby time after the end of the shift or the last call to the switching center was, as such, compensable. To allow a recovery is clearly a windfall compensation, to bar recovery for which the Portal Act was passed (see O. B., p. 27).

III.

The Record Showing Without Controversy That the Court Was Without Jurisdiction of the Subject Matter of the Action, It Had No Other Alternative Than to Dismiss the Case on That Ground.

The Administrator repeatedly asserts that the record shows there were controverted issues between the parties, and cites a number of decisions to the effect that summary judgment should not be granted where there is any conflict as to any material issue. The cases need not be commented on. The principle is axiomatic, but is inapplicable to the instant case, for the reason that *the only fact upon which there is any dispute is in no wise material to the issue of jurisdiction.*

Further, summary judgment was not rendered but the case *dismissed for lack of jurisdiction.* It is axiomatic that it is a prerequisite to a District Court proceeding with a cause that at all times its jurisdiction of the subject matter of the action clearly appear on the face of the record, and where it is questioned, the plaintiff must show the existence of facts necessary to confer jurisdiction upon the Court. See *McNutt v. General Motors Acceptance Corporation, supra*, 228 U. S. 178, 181, *et seq.*, Ap. pp. 124-125.

The observation of the Federal District Court of Missouri, in *Johnson v. Park City Consolidated Mines Co.*, 73 Fed. Supp. 852-857, quoted from at length in our Ap.-2, is most appropriate:

“If plaintiffs can prove a contract or custom as called for by the amended Act *it should not be kept secret until the trial.* Likewise if they cannot produce such evidence that *should not be kept secret until the trial.*”

It is not true, as suggested by the Administrator, that the issue of jurisdiction was summarily disposed of. The record shows that appellants were accorded every opportunity to make a showing, if they could, that there was a contract or custom or practice to pay for their standby time during the nighttime hours. There were two pre-trial hearings, depositions of twelve of the appellants taken, interrogatories propounded by the respective parties to each other and answered. No trial on the merits, no matter how protracted, could have changed the following facts which are established by the present record without controversy: (1) That the appellants, by their answer to interrogatories, state that the contract was partly written and partly custom and practice, that the written part consisted of Bulletin A-36; (2) that Bulletin A-36 was a promise to pay time and a half for hours worked in excess of forty hours per week, but did not specify what constituted work or what activity was compensable; (3) that appellants had been paid a monthly salary, which they allege was for a definite eight hour shift; (4) that appellants always reported eight hours of work whether they performed that many or not, and as overtime any emergency service performed during the nighttime hours for which they were paid time and a half, their hourly rate being computed on the theory that their salary was applicable to forty hours of work per week; (5) appellants never asked for or received other compensation.

We submit that the District Court could have reached no other conclusion than that it did not have jurisdiction of the subject matter of the action. That decision of the

District Court, of course, is binding upon this Court *unless the record clearly shows that it was erroneous*.

As repeatedly pointed out, it was to avoid the useless waste of the time of the Court, which in the instant cases probably would be many months, and the enormous expense to the parties that would result from a trial of cases of this character, that Congress withdrew jurisdiction from all Courts of suits for overtime compensation based upon activities not made compensable by an express provision of a contract or by custom and practice.

The observations of Judge Picard in *Bateman v. Ford Motor Co.* (Mich.), 76 Fed. Supp. 178, 180 (affirmed 169 F. 2d 266, cert. denied 93 L. Ed. 247), are most pertinent. There, after pointing out that on a retrial of the *Mount Clemens* case, the Court had found the dressing time to be within the *de minimis* rule, said:

“Congress, therefore, knowing the peril to be imminent, concluding that it could not await the usual turning of the wheels of justice, determined that the courts be relieved of the burden of ‘*excessive and needless litigation and champertous practices*’ and *business relieved of a heavy burden of doubt*. In remedy it amended the *Fair Labor Standards Act* by the *Portal-to-Portal Act*, . . .”

See, also, Ap. XII, page 150, and Ap.-2, page 16, and cases collated.

The Administrator cites, as do appellants, *Kennedy v. Silas Mason Co.*, 334 U. S. 249, and *Twigg v. Yale & Towne Mfg. Co.*, 7 F. R. D. 488. In the first case the decision was based largely on the fact that an incomplete record had been presented to the Court and that a sum-

mary judgment should not be granted in a complex case where the factual situation was uncertain and indefinite. The second case held that where the record showed that the right of recovery depended upon a conflict in the evidence so that it could not be said as a matter of law that the plaintiffs could or could not recover, the Court should withhold its determination as to its jurisdiction under the Portal Act for a trial on the merits.

In the instant cases the record is neither complex nor the factual situation uncertain or indefinite. The record is voluminous only because of the number of plaintiffs, there actually being seventy-three or more separate lawsuits joined in the two actions.

We submit that as a matter of common sense and justice a record cannot be said to be confused or indefinite merely because the essential facts are established by various and sundry documents contained in the record, such as the affidavits of the parties, depositions, and answers to interrogatories, or because the action is brought by numerous employees. Otherwise, in a wage and hour case a summary judgment or dismissal for want of jurisdiction could always be avoided by joining a large number of employees as parties plaintiff.

In conclusion, we cannot refrain from suggesting that it seems to us that the Administrator's interest in any litigation affecting the Portal Act or the Wage and Hour Act should be limited to questions of law which might affect the proper administration of those Acts. In the instant cases the only questions of that character are the affirmative defenses, two of them resting upon the Administrator's own acts. The Administrator, however, in-

stead of attempting any reply to our discussion of those defenses has confined his brief entirely to a question which, it seems to us, is one in which only the parties can properly be interested, viz.: whether or not there is a factual dispute disclosed by the record sufficient to require a trial upon the merits.

We respectfully but confidently submit that the judgment of dismissal for lack of the Court's jurisdiction must be affirmed.

All of which is respectfully submitted.

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APPENDIX.

I.

The Cases Cited by the Administrator Do Not Sustain His Contention That Either the Allegations of the Complaint, or the Affidavit, or the Provisions of Bulletin A-36 Make the Standby Time Compensable by a Direct Provision of the Contract.

Tipton v. Bearl Sprott Co. (C. C. A. 9), 175 F. 2d 432.

This is the first case that the Administrator cites to the effect that the allegations of the complaint are sufficient to show that the standby time was compensable by a direct provision of the contract and that the affidavit and the provisions of Bulletin A-36 likewise established that fact. The decision does not at all sustain the point to which it is cited.

The action was by employees of a cafeteria, it being alleged that the defendant operated the cafeteria at all times in connection with a plant of the Columbia Steel Company which was manufacturing steel and selling the same in commerce. It was alleged specifically that the maintenance of this cafeteria was a necessary and essential adjunct to the manufacture of steel by Columbia. It was then alleged that the plaintiff employees had been required to perform more than 40 hours of service per week without being paid time and a half for the services in excess of 40 hours. The nature and character of the services in excess of 40 hours were not alleged.

The jurisdiction of the Court was not challenged by motion or otherwise, but the suit was dismissed on the ground that it did not state a claim upon which relief could be granted, this on the theory that the averment

that the maintenance of the cafeteria was necessary to the manufacture of steel as a matter of law was incorrect. The decision of this Court was to the effect that it could not be declared, as a matter of law, that the averments that the cafeteria was maintained as a restaurant and a necessary adjunct to the manufacture of steel were untrue.

The Court pointed out on trial that the plaintiff would have the burden of establishing the fact and that he could not maintain the action.

The Administrator insists that this portion of the decision is equally applicable to the instant cases and the appellants on the trial of the merits will be required to maintain the burden of showing the necessary jurisdictional facts. Reflection will show, however, the difference between the cited case and the instant cases. In the cited case there was a general allegation that the maintenance of a cafeteria was a necessary incident to the manufacture of steel. That general allegation did not disclose the probative facts in support of or against the averment. In the instant cases all of the essential facts on the issue of jurisdiction appear without controversy. As pointed out in the brief, no trial on the merits could change the facts which are established by the answers to the interrogatories, the depositions of appellants and appellants' affidavits.

In the cited case this Court held that the District Court should, on its own motion, have dismissed the case for want of jurisdiction, because of the failure of the complaint to allege the specific services for which compensation was being recovered and facts showing that

such services were made compensable by either an express provision of a contract, or by custom or practice, this Court saying on this issue:

“There was, however, a valid ground for dismissing the third amended complaint—a ground not suggested to or considered by the District Court. This will now be discussed.”

Tipton v. Bearl Sprott Co. (C. C. A. 9), 175 F. 2d 432, 436.

After setting forth the provisions of Section 2 of the Portal Act, the Court continued:

“As indicated above, this action was instituted by appellants against appellees (the alleged employers of appellants) to enforce the alleged liability of appellees under the Fair Labor Standards Act of 1938 for and on account of their alleged failure to pay appellants overtime compensation for and on account of alleged activities of appellants engaged in prior to May 14, 1947. The third amended complaint did not allege that such activities were compensable by an express provision of a written or nonwritten contract in effect at the time of such activities, between appellants, their agent or collective-bargaining representative and appellees, or by a custom or practice in effect at the time of such activities, at the establishment or place where appellants were employed, covering such activities, not inconsistent with a written or nonwritten contract, in effect at the time of such activities, between appellants, their agent or collective-bargaining representative and appellees, or that such activities were engaged in during the portion of the day with respect to which they were so made compensable.

“Thus the third amended complaint failed to state a claim of which the District Court had jurisdiction. *It should have been dismissed on that ground. That the District Court’s jurisdiction was not challenged is immaterial.*

“We are advised that, if granted leave to file a fourth amended complaint, appellants can and will allege all necessary jurisdictional facts. Such leave should be granted.”

Tipton v. Bearl Sprott Co. (C. C. A. 9), 175 F. 2d 432, 436-437.

Joshua Hendy Corporation v. Mills (C. C. A. 9), 169 F. 2d 898.

That case was also relied upon by the appellant and has been analyzed on pages 29-30 of its brief.

The suit was by a personal representative of a deceased employee of the appellant. The opinion shows that the decedent was employed as an engineer; that he worked on two shifts, one the graveyard shift, which was 7½ hours, and the other the day shift, which was 8 hours. It was alleged and conceded that decedent was employed for 6 days a week and on the 6th day was paid time and a half for 8 hours. It was alleged, however, that he worked 3 additional hours, for which he received no compensation. The union contract provided for overtime for time and a half for more than 40 hours per week and provided also that employees have one-half hour lunch time on their own time. The averment that Mills had worked 51 hours per week was based on the allegations and proof that he was not furnished a half-hour for lunch, but that he had to eat his lunch while engaged in discharging his regular duties, the evidence showing that, because appellant deemed it impractical, decedent was not furnished a relief

man at his lunch hour and hence was compelled to stay at his desk where he could watch the boilers and adjust them, eating his lunch as he was able to during the performance of his duties. In other words, instead of being given a half-hour of entire relaxation during his lunch time, he was compelled to work through the day shift, or $8\frac{1}{2}$ hours per day.

The District Court allowed him a recovery for his entire time. This Court modified the judgment by disallowing any overtime for his graveyard shift, holding that the record showed that during the time he was on that shift he had not worked more than 48 hours a week and had been paid time and a half for 8 hours of overtime, but that the record showed that on the day shift he had worked 51 hours a week and had been paid overtime only for 8 hours and, therefore, was entitled to time and a half for the three extra hours per week, saying on this, in part:

“The day shift work presents a different situation. Mills actually worked three hours each week for which he received no compensation. He worked 51 hours, received 40 hours straight time pay and 8 hours overtime pay.

* * * * *

“The lunch period provisions of the contract could have no application to the engineers since, during the time they were on shift, no ‘employees’ time’ could be found in which they could eat lunch. Section (c) of paragraph 5 obviously refers to those employees only who ate lunch on their own time. It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the work week at 40 hours straight time and 8 hours overtime and further provides for

the payment of overtime for all 'work performed' in excess of 40 hours per week. Mills performed 11 hours work in excess of 40 hours within the meaning of the phrase 'work performed.' He was paid for 8 hours overtime only."

Joshua Hendy Corporation v. Mills (C. C. A. 9),
169 F. 2d 898, 899, 900.

It is to be especially noted that the case presents no issue at all similar to that involved in the instant case. There was no question of standby time, nor was there any question of the extra services being performed at a time during which they were not made compensable. It was a simple case of an employee being required to work for 6 days a week, steadily performing exactly *the same services* for 8½ hours, and for 5 days a week being paid straight time for only 8 hours, and for the sixth day time and a half for the extra 8 hours, leaving a half hour for six days uncompensated for.

Frank v. Wilson & Co. (C. C. A. 7), 172 F. 2d
712.

On page 7 of the Administrator's brief this case was cited as following the *Joshua Hendy Corporation v. Mills* case, *supra*, and it is stated that it involved a situation quite similar to the instant case. The slightest examination will show that the case does not sustain the Administrator's contention and bears no resemblance to the instant cases. The suit was for overtime for changing their clothes after and preparatory for work. The union contract provided for an 8-hour shift for 5 days a week for a specified compensation, and for time and a half for any work in excess of 40 hours per week. It was alleged and shown by the evidence that the employees

worked 8-hour shifts starting at 8:00 o'clock in the morning and were required to be dressed and report for and commence work five minutes before the whistle started. The District Court held that they had, therefore, been shown to have been doing actual work for 8 hours and 5 minutes per day and rendered judgment for plaintiffs.

On appeal it was contended that under the Portal Act the Court was without jurisdiction of the five minutes per day for which overtime was sought, and in denying it the Court said in part:

"The trial court found that the plaintiffs were required to commence their usual activities five minutes before the time defendant computed the start of their working day for payroll purposes.

* * * * *

"We are bound by the finding of the district court that the plaintiffs were required to work five minutes in excess of the eight regular hours on each of the days indicated by the time cards in evidence (as compiled in the stipulation). We conclude that the activities of the plaintiffs were covered by an express provision of a written contract, and that the Portal-to-Portal Act of 1947 is not a bar to maintaining this action."

Frank v. Wilson & Co. (C. C. A. 7), 172 F. 2d 712, 715.

It will be noted here again that this was a case where the employees were required to actually and continuously perform precisely the same services for more than 40 hours per week. It did not involve in any sense standby time or any preliminary or postliminary activities.

However, in the case cited, the judgment of the District Court was reversed on the ground that the time involved came within the *de minimis* rule.

II.

Decisions Reported Subsequent to the Filing of Our Brief to the Effect That the Allegations in the Complaint Are Not Sufficient to Confer Jurisdiction, and That Express Contracts of Employment Containing Provisions Similar to Bulletin A-36 to the Effect That Employees Are to Be Paid a Definite Hourly Wage or Specific Weekly or Monthly Salary and Time and a Half in Excess of Forty Hours Per Week, Do Not Meet the Requirements of the Portal Act in That They Do Not Specify the Particular Activities Which Are to Be Paid for.

Newsom v. E. I. Du Pont De Nemours & Co.
(C. C. A. 6), 173 F. 2d 856, 859, 860 (decided April 14, 1949).

Action for preliminary and postliminary activities, dressing, walking time, etc., filed after the *Mount Clemens* decision and before the Portal Act. After the effective date of that statute, the plaintiffs amended to allege that by an agreement between the union and the company any work over forty hours a week should be compensated for at time and a half, it being alleged that the contract provision with reference thereto was as follows:

“(a) Time and one-half will be paid to hourly roll employees:

“1. For hours worked in excess of eight (8) when more than eight (8) hours are worked consecutively except that, when an employee receives overtime premiums under Company rules for work prior to the start of his regularly scheduled work period, overtime premiums for hours worked in excess of eight (8) will be off-set by the overtime premiums payable under such Company rules.”

After an answer had been filed to this complaint the District Court dismissed it for lack of jurisdiction of the subject matter. In sustaining this decision, the Sixth Circuit Court of Appeals said (a small portion of the first part of the quotation being set out in our brief):

“In order that activities be expressly compensable under this provision they must be specifically described. A contract which does not refer to and specify the activities for which compensation is to be made does not bring the exception into force. It is undisputed on this record that the parties, in executing the contract of September 2, 1944, did not contemplate that the activities described in the complaint should be paid for. Such activities, at that time and always, prior to the decision in *Tennessee Coal, Iron & Rd. Co. v. Muscoda Local No. 123*, 321 U. S. 590, 64 S. Ct. 698, 88 L. Ed. 949, 152 A. L. R. 1014; *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U. S. 161, 65 S. Ct. 1063, 89 L. Ed. 1534; and *Anderson v. Mt. Clement Pottery Co.*, 328 U. S. 680, 696, 66 S. Ct. 1187, 90 L. Ed. 1515, had been considered as incidental to and included in the productive work and compensated for by the rate of pay on the particular job. The first requisite, then, for the existence of a contract between the parties to pay for these particular activities, namely, a meeting of the minds, was completely lacking. The transactions in controversy fall squarely within the situation described in the findings and declaration of policy of the Congress made in §1 (a) (5) of the Portal-to-Portal Act, 29 U. S. C., §251 (a) (5), 29 U. S. C. A. §251 (a) (5), namely, that if this recovery is allowed, it will give payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in.

“The Portal-to-Portal Act, which became law subsequent to the enactment of the Fair Labor Standards Act, was framed with specific reference to activities such as those involved herein. As has often been repeated, it was passed in order to bar the innumerable claims that were being filed under the Fair Labor Standards Act in order to take advantage of the decisions in *Tennessee Coal, Iron & Rd. Co. v. Muscoda Local 123*; *Jewell Ridge Coal Corp. v. Local No. 6167*; and *Anderson v. Mt. Clemens Pottery Co.*, *supra*. Appellants in effect ask us to read these interpretations into the contract in suit, although with certain exceptions the Portal-to-Portal Act expressly repealed them. *Seese v. Bethlehem Steel Co.*, 4 Cir., 168 F. (2d) 58, 62. Such a construction would nullify both the purpose and the provisions of the Portal-to-Portal Act. There being no allegation or proof of the existence of an express contract or custom to pay for the activities described in the complaint, they are barred. The District Court had no jurisdiction of them, 29 U. S. C., §252(d), 29 U. S. C. A. §252(d), and a cause of action is not stated.”

Newsom v. E. I. Du Pont De Nemours & Co.
(C. C. A. 6), 173 F. 2d 856, 858, 859, 860.

Galvin, et al. v. National Biscuit Co. (S. D., N. Y.), 82 Fed. Supp. 535.

Suit for overtime compensation. Motion to dismiss was interposed by defendant for lack of jurisdiction, and in the alternative, motion for summary judgment. The complaint alleged that the contract between the union and the defendant provided for a definite eight hour shift for which they were paid a definite amount, and also provided for compensation for fifteen minutes before the start of the shift for dressing, that it took more than fifteen

minutes, to wit, thirty minutes; that by custom and practice, the defendant permitted them to leave five minutes before the end of the shift for the purpose of washing up and changing their clothes; that it took more than five minutes to wash and change, and overtime was sought for fifteen minutes for dressing time additional to that which they were paid for, and for time spent in washing and dressing after the shift.

The Court dismissed the action with reference to the claim for their postliminary activities, saying in part:

“Assuming plaintiffs’ allegations of fact to be true, two questions are presented:

“(1) where a postliminary activity was made compensable by custom but only when engaged in during a specified period of the shift—here the last five minutes—did the time spent in that activity outside of that period thereby become compensable?

“(2) where a preliminary or postliminary activity was by contract made compensable for a specified length of time (here 15 minutes for clothes-changing), did any time spent in that activity in excess of the specified length of time thereby become compensable?

“Plaintiffs argue that after November 1, 1944, clothes-changing was an activity compensable by an express provision of a written contract, 29 U. S. C. A. §252(a) (1); that both before and after that date certain postliminary activities were compensable by custom, 29 U. S. C. A. §252(a) (2); that in calculating employed time, all the time during which an employee engaged in a compensable activity must be included, 29 U. S. C. A. §252(b); that if employed time is so calculated, the defendant will be found liable for unpaid overtime compensation.”

The Court then set forth Section 2(b) of the Portal Act and the Conference Report, a portion of which has been quoted in our brief, saying:

“In the light of the illustration contained in the Conference report, the first question here presented must be answered in the negative. Insofar as plaintiffs’ claim is based on the allegation that both before and after the 1944 contract it was the custom to allow employees to suspend five minutes before the end of the shift for postliminary activities such as washing up, it is clearly proscribed by the statute.”

Galvin, et al. v. National Biscuit Co. (S. D., N. Y.), 82 Fed. Supp. 535, 536, 537.

Hutchings v. Lando (S. D., N. Y.), 83 Fed. Supp. 615.

Motion to dismiss granted. The plaintiffs, after the Fair Labor Standards Act, amended by alleging:

“‘That at all times hereinafter mentioned, the above activities of the plaintiff were compensable under the express provisions of the employment agreement between the plaintiff and defendant in effect at the time of such activities, and such activities were enjoyed in during the portion of the day with respect to which they were so made compensable.’”

In granting the motion to dismiss, the Court, citing a great number of cases, said:

“The facts required by Section 2(a) (1, 2) of the Portal-to-Portal Act are jurisdictional and a complaint failing to allege them must be dismissed as defective. *Battaglia, et al. v. General Motors Corporation*, 2 Cir., 169 F. 2d 254.

“A general allegation in the language of the statute that activities were compensable under an express provision of the contract, without setting forth the contract or particular provision thereof or facts in support of such allegation is insufficient to cure the jurisdictional defect.”

Hutchings v. Lando (S. D., N. Y.), 83 Fed. Supp. 615, 616.

Berkowitz v. All Service Laundry Corp., 87 N. Y. S. 2d 187, 188, 189.

Plaintiffs, after the Portal Act, amended their complaint by alleging:

“20. That the employment of the plaintiff for work weeks in excess of the applicable maximum hours prevailing under Section 7 of the Act without compensating him for such excess hours at rates not less than 1½ times the regular rates at which he was employed, was in violation of Section 7 of the Act, and of the custom or practice in effect during said period at defendants' places of business, and of the express provision of a contract between the plaintiff and defendants.”

In granting the motion to dismiss, the Court said:

“The rule prevailing in the Federal courts appears to be that a cause of action based upon the Fair Labor Standards Act of 1938, as amended by the Portal-to-Portal Act, must affirmatively allege and definitely establish by facts the right to maintain such action and the jurisdiction of the Court. A mere allegation in the language of the statute of such

right and of such jurisdiction, without alleging facts in support thereof, is insufficient. *Sadler v. W. S. Dickey Clay Mfg. Co.*, D. C., 78 F. Supp. 616, 618. There the Court said, 78 F. Supp. at page 618:

“Under the established rule, that a plaintiff suing in a Federal Court must show in his petition affirmatively and distinctly, the existence of whatever is essential to Federal Jurisdiction, we believe that under Section 2(d), *supra*, of the Portal-to-Portal Act of 1947, plaintiffs, relying upon a contract, must allege the express provision of such contract that would authorize the payment of compensation for the particular activity claimed; or if relying upon a custom, that he should allege facts from which the custom or practice may be inferred that would make such activities compensable. If a plaintiff does not do so, the Court, on having such defect called to its attention, upon discovering the same may dismiss the case, * * *.’

“To the same effect see *Lockwood v. Hercules Powder Co.*, D. C., 78 F. Supp. 716; also *Boerkoel v. Hayes Mfg. Corporation*, D. C., 76 F. Supp. 771.

“The same rule obtains in our State Courts. It must appear that all the facts upon which a cause of action depends, as stated in the statute, are alleged in the complaint. Pleading the bare language of the statute is clearly defective. *Emanuele et al. v. Rochester Packing Co., Inc.*, 182 Misc. 348, 350, 45 N. Y. S. 2d 164, 166; *Broderick v. Lemkau-Kidd Corporation*, 267 App. Div. 91, 44 N. Y. S. 2d 505.”

Berkowitz v. All Service Laundry Co., 87 N. Y. S. 2d 187, 188, 189.

Schelling v. Star Switchboard Company (N. Y.),
(not yet officially reported), 16 Labor Cases
65,230.

The Court, in granting the motion to dismiss, said:

“The original complaint was dismissed because it did not allege ‘compensability by contract, custom or practice.’ The amended complaint now before the Court is identical with the complaint already dismissed except that it alleges in paragraphs 5, 13, 21 and 29 (in each of the four causes) ‘that the said services and work performed * * * were performed pursuant to contract, custom and practice.’ It has been held that this allegation, without facts to show such a contract, custom or practice, is insufficient (*Berkowitz v. All Service Laundry Corp’n*, 87 N. Y. Supp. (2d) 187, 189 (16 Labor Cases Par. 64,977)). The motion to dismiss is granted.”

Schelling v. Star Switchboard Company (not yet
officially reported), 16 Labor Cases 65,230, pp.
75,861-2.

III.

Additional Decisions That When Lack of Jurisdiction Appears on the Face of the Record, It Is the Duty of the Court to Dismiss the Case.

Fisch, et al. v. General Motors Corporation;

Bateman v. Ford Motor Co. (C. C. A. 6), 169 F. 2d 266, 269 (certiorari denied 335 U. S. 902).

The second of these cases has been cited in our brief as affirming the decision of the District Court from which we quoted.

The appeals in the two suits were consolidated. Both actions were instituted after the *Mount Clemens* decision for walking and dressing time. After the effective date of the Portal Act the complaints were amended by alleging that plaintiffs' services were made compensable by a written contract between the respective employers and the Government of the United States wherein each employer defendant agreed that it would fully comply with all federal laws and regulations including the Fair Labor Standards Act. A motion to dismiss was granted, the District Court holding, as shown in our brief, that the alleged contract did not meet the requirements of the Portal Act. In our brief (page 18), we quoted from a portion of the decision of the District Court in support of our contention that the object which Congress had in withdrawing jurisdiction from all courts of suits for activities made non-compensable by Section 2 was the express purpose of preventing the unnecessary waste of the time of the courts and the tremendous cost to litigants that would be involved in such trials. The Circuit Court

of Appeals in affirming the judgment of dismissal of the District Court said, in part (citing a large number of cases):

“We cannot yield to plaintiffs’ contention that the court’s action on the motion to dismiss was premature. If it appeared to the satisfaction of the court *at any time* after the suits were brought that they did not really and substantially involve a dispute or controversy properly within its jurisdiction, *it was its duty to proceed no further and to dismiss the suit.*” (First italics the Court’s.)

Fisch, et al. v. General Motors Corporation,
Bateman v. Ford Motor Co. (C. C. A. 6), 169 F.
2d 266, 269 (certiorari denied 335 U. S. 902).

Johnson v. Park City Consolidated Mines Co. (D.,
Mo.), 73 Fed. Supp. 852.

In granting a motion to dismiss for lack of jurisdiction where the complaint merely contained a general allegation that overtime was to be paid for, the Court said in part:

“This action involves a large number of records and employees. It would require expenditure of large sums of money and time to get ready for trial and the trial would be long, in fact might even call for a master. Why go through such procedure, as suggested by plaintiffs, to reach a position that is now obvious from the record. If plaintiffs can prove a contract or custom as called for by the amended Act *it should not be kept secret until the trial. Likewise if they cannot produce such evidence that should not be kept secret until the trial.*”

Johnson v. Park City Consolidated Mines Co. (D.
Mo.) 73 Fed. Supp. 852, 857.

Battaglia v. General Motors Corporation (C. C. A. 2), 169 F. 2d 254 (certiorari denied 335 U. S. 887).

Suit was for overtime compensation for preliminary and postliminary activities. The suit was filed following the *Mount Clemens* decision, and after the Portal Act motion to dismiss was interposed. The Court offered to allow plaintiffs to amend. This they declined, standing on their claim that the Portal Act was unconstitutional. In affirming the dismissal, the Second Circuit Court of Appeals said in part:

“It was the duty of the court to ascertain whether it had jurisdiction before proceeding to hear and decide the case on the merits. *Emmons v. Smitt*, 6 Cir. 149 F. 2d 869, certiorari denied, 326 U. S. 746, 66 S. Ct. 59, 90 L. Ed. 446; *Ex parte McCardle*, 7 Wall. 506, 19 L. Ed. 264; see *Smith v. McCullough*, 270 U. S. 456, 459, 46 S. Ct. 338, 70 L. Ed. 682; Rule 12 (h), Federal Rules of Civil Procedure, 28 U. S. C. A. following §723c. The allegation of facts to show jurisdiction in the district court is a prerequisite to the trial of an action on the merits.”

Battaglia v. General Motors Corporation (C. C. A. 2), 169 F. 2d 254, 256 (certiorari denied 335 U. S. 887).



Nos. 12,070, 12,071.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12,070.

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

No. 12,071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

Petition for Rehearing or, in the Alternative,
Modification of the Opinion.

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**Petition for Rehearing or, in the Alternative,
Modification of the Opinion.**

*To the Honorable United States Court of Appeals for
the Ninth Circuit, and to the Judges Thereof:*

The appellee in the above entitled causes respectfully petitions for a rehearing of these causes or, in the alternative, for a modification of the opinion heretofore rendered, on the ground that the opinion misinterpreted Section 2 (a) (2) of the Portal-to-Portal Act.

Throughout this petition all emphasis is ours unless otherwise noted.

In the opinion it is said:

“There is no question but that the Portal-to-Portal Act constitutes a complete defense to both actions if it applies. Its application depends upon whether the employment by express terms require pay for what has been termed the inactive periods (29 U. S. C. A. § 252 (a) (1)) *or whether like inactive periods in comparable enterprises practice paying therefor.*”

We respectfully submit that the italicized portion of the above quoted portion of the opinion was erroneous and exactly contrary to the express wording of the statute and the express intention of Congress. Section 2 (a) of the Portal-to-Portal Act provided that no employer should be liable on account of any activity engaged in prior to the date of enactment unless it was made so by

“(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

“(2) a custom or practice in effect, at the time of such activity, *at the establishment or other place where such employee was employed*, covering such activity * * *

Congress, in the foregoing language, which is too clear to admit of the slightest ambiguity, excluded *an industry custom or practice* and specifically made that of each particular employer controlling. The Congressional Record shows that this was no inadvertence but the express intention of Congress, which twice debated the question as to whether the controlling custom or practice should be

that of the industry or of each particular place of employment, and twice voted for the wording of the bill as passed.*

On February 27, 1947, Representative Celler, in speaking against the bill as enacted, said:

“* * * Compensation may be barred by custom or practice. *And it is not custom or practice in the industry but in the particular establishment.* Practices in different plants within the industry may differ. Thus wages may differ in different places. That may be noncompetitive conditions.”

House of Rep., Feb. 27, 1947, 93 Cong. Rec. 1550.

On that same day Representative Kefauver closed his argument in support of Mr. Celler's contentions as follows:

“The gentleman from New York [Mr. Keating] offered an amendment providing that this custom or practice should be that practiced by the *industry in a particular locality.* That would help to a certain degree, *but that amendment unfortunately was not adopted.*”

House of Rep., Feb. 27, 1947, 93 Cong. Rec. 1562.

*In Part I of the Portal Act, explaining the reasons for its enactment it is recited:

“* * * (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that *included in their agreed rates of pay*; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated *by either the employer or employee* at the time they were engaged in; * * *

The next day Representative Javits offered the following amendment:

“On page 6, line 5, strike out the period after the word ‘representative’ and substitute a semicolon and insert the following clause: ‘or upon the failure of an employer to pay any other employee for activities heretofore or hereafter engaged in by such employee other than those activities which at the time of such failure were specifically required to be paid for, either by custom or practice *of the particular industry most nearly applicable to such activities*, or by express agreement at the time in effect between such employer and such employee.’ ”

House of Rep., Feb. 28, 1947, 93 Cong. Rec. 1622.

After debate this amendment was defeated on that same day (Congressional Record 1623).

In the Senate in a debate upon the bill, Senator Hawkes on the 18th of March, 1947, said, in part:

“Mr. Hawkes. Is it not true that the bill states that portal-to-portal activities do not come under the term ‘work’ unless the parties specifically understand and agree that they are to come under that term?

Mr. Donnell. Either by contract or custom or practice.

Mr. Hawkes. Yes, either by contract or custom or the habits of the community that are familiar to the people.

Mr. Donnell. No, Mr. President, I would not say ‘the habits of the community’; *but the custom in the*

particular place of business or particular establishment or other place where the employee is employed. Mr. Hawkes. That is exactly what I meant. Probably I misspoke myself."

82 Senate Report, p. 45, colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253.

On the 19th of March, Senator McCarran, in discussing this phase of the bill, said:

"Mr. McCarran. * * * I call particular attention, Mr. President, to the language 'at the establishment or other place where such employee was employed.' That does not mean the general custom or practice in an industry, Mr. President. *It does not mean a custom or practice generally accepted and sanctioned by usage.* It means nothing more or less than a custom or practice *put into effect by the employer at the particular establishment in question.*"

Senate of the U. S., March 19, 1947, 93 Cong. Rec. 2321.

The Court's summarization of Section 2 (a) (2) of the Portal Act apparently construes the Act as though the amendment to it, *twice proposed and twice rejected by Congress* had been adopted. The summarization is not only contrary to the clear language and intent of Congress, but to this Court's prior interpretation of the Portal Act and to that of other Courts.

In *Tipton v. Bearl Sprott Co.*, 175 F. 2d 432, the District Court dismissed the action on the ground the complaint did not show the employees were engaged in interstate commerce. This Court held the complaint sufficient in that regard but held that it did not show the jurisdiction required by the Portal Act and, since it was conceivably

possible it could be amended, reversed with directions to plaintiffs to amend if they were so advised, saying:

“The third amended complaint did not allege that such activities were compensable by an express provision of a written or non-written contract in effect at the time of such activities, between appellants, their agent or collective-bargaining representative and appellees, or by a custom or practice in effect at the time of such activities, *at the establishment or place where appellants were employed, covering such activities*, not inconsistent with a written or non-written contract, in effect at the time of such activities, between appellants, their agent or collective-bargaining representative and appellees, or that such activities were engaged in during the portion of the day with respect to which they were so made compensable.

“*Thus the third amended complaint failed to state a claim of which the District Court had jurisdiction.* It should have been dismissed on that ground. That the District Court’s jurisdiction was not challenged is immaterial.” .

Tipton v. Bearl Sprott Co., 175 F. 2d 432, 436-7.

The precise question came before the Second Circuit in *Bonner v. Elizabeth Arden, Inc.*, 177 F. 2d 703, 705. In that case the District Court, after the Portal Act, granted a motion to dismiss for lack of jurisdiction. Plaintiff then sought leave to file an amended complaint, in which it alleged that it was the custom and practice in the industry generally to pay for the particular activity for which overtime was sought. The District Court in denying the motion said, in part:

“This, clearly, is not a compliance with Section 2 (a) (2) of the Act, which provides that ‘No employer shall be subject to any liability * * * ex-

cept an activity which was compensable by * * *
(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, * * *'

"There may well have been such a custom or practice in the industry, which was not, however, in effect in the defendant's establishment."

Bonner v. Elizabeth Arden, Inc., 80 F. 2d 243, 245-6.

The Circuit Court of Appeals affirmed the dismissal, saying:

"The proposed amended complaint added to the first count allegations that 'it was the custom and practice in this industry to pay these employees for overtime hours spent in preliminary and postliminary activities prior to and subsequent to the performance of their duties' and that pursuant to the custom in the trade such activities were compensable work.' But there was no allegation, as §2 of the statute required, in respect to activities engaged in prior to May 14, 1947, to the effect that these activities were compensable either by a contract between the employee, or someone acting for him, and the employer in effect at the time they took place, or in accordance with a custom or practice *at the place of employment covering such activities*, in effect at the time they took place, and not inconsistent with a contract binding both employees and employer and in effect at the time. Consequently as regards activities engaged in prior to May 14, 1947, the first count of the proposed amended complaint failed to comply with the jurisdictional requirements of §2 of the Portal to Portal Act, *supra*. * * *"

Bonner v. Elizabeth Arden, Inc., 177 F. 2d 703, 705.

See to the same effect:

Markert v. Swift & Co. (2nd. Cir.), 173 F. 2d 517.

The Wage and Hour Administrator on November 18, 1947, in his bulletin interpreting the Act said:

“(d) The words ‘custom or practice’ as used in the Portal Act, do not refer *to industry custom or the habits of the community which are familiar to the people*; these words are qualified by the phrase ‘in effect * * * at the establishment or other place where such employee was employed’. The compensability of an activity under custom or practice, for purposes of this Act, *is tested by the custom or the practice at the ‘particular place of business’, ‘plant’, ‘mine’, ‘factory’, ‘forest’, etc.’*”

The erroneous statement of the Court is readily understandable. Ordinarily, where the rights of the parties depend upon custom or practice, it is the custom or practice *not of an individual, but of the industry*. However, the misinterpretation of Section 2 (a) (2) of the Portal Act apparently was controlling of the decision, for following it the opinion states:

“There is nothing conclusive in the case as it was presented to the trial court upon the issue of practice or custom in other like enterprises.”

There not only was no conclusive showing but no showing at all as to any industry custom or practice. The affidavits as to custom and practice of the P G & E were introduced upon entirely different issues raised by appellee’s affirmative defenses for an entirely different pur-

pose, namely, to show that the custom and practice of that company was similar to the appellee's so as to justify appellee in relying upon certain rulings made by the War Labor Board with reference to the P G & E.

If, as seems apparent from the face of the opinion, the decision of this Court that a trial on the merits is necessary was based on the erroneous assumption that the practice or custom in other like enterprises was an issue upon which a conclusive showing had to be made, then, we submit, we are entitled to a rehearing. If the erroneous statement of the Court was a mere inadvertence in summarizing Section 2 (a) (2) of the Act and this Court feels that the question of lack of jurisdiction of the District Court cannot be decided on a motion but requires a trial on the merits, then we are in the position usually occupied by losing counsel of respectfully disagreeing with the Court's views but bowing to them. However, in such event we believe the Court will agree with us that the opinion should be modified by changing the last paragraph on page 3 to read as follows:

“ . . . Its application depends upon whether the employment by express terms require pay for what has been termed the inactive periods (29 U. S. C. A. §252 (a) (1)) or whether the inactive periods were made compensable by custom or practice in effect *at the time of such activities at the establishment or other place where the appellants were employed.*”

and that there be deleted from the opinion the portions heretofore quoted:

“ . . . There is nothing conclusive in the case as it was presented to the trial court upon the issue of practice or *custom in other like enterprises.*”

While we are confident that it can be demonstrated that the appellee's custom or practice was the custom and practice of the industry not only throughout California but the nation, still, we submit that neither party should be put to the unnecessary time and expense of preparing for or introducing evidence in a trial on the merits upon any issue of an industry custom or practice when Congress twice rejected custom or practice of an industry and made that of each place of employment controlling.

We, therefore, respectfully but confidently submit that we are entitled to a rehearing, or a modification of the opinion in the manner suggested.

All of which is respectfully submitted.

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The undersigned certifies that in his judgment the foregoing petition is well founded and that it is not interposed for delay.

NORMAN S. STERRY.

